

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HANGZHOU CHIC INTELLIGENT and
UNICORN GLOBAL, INC.,

Plaintiffs,

-vs-

THE PARTNERSHIPS AND
UNINCORPORATED ASSOCIATIONS
IDENTIFIED ON SCHEDULE "A,"

Defendants.

Case No. 20 C 4806

Chicago, Illinois
December 2, 2022
10:00 a.m.

TRANSCRIPT OF PROCEEDINGS - PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE THOMAS M. DURKIN

APPEARANCES:

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13 ALSO PRESENT: Mr. Peter Phaneuf

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1 (Proceedings heard in open court:)

2 THE CLERK: This is case number 20 CV 4806, ABC
3 Corporation v. The Defendants Identified on Schedule A.

4 Could I please have the attorneys present on behalf
5 of the plaintiffs state their names?

6 MR. LOMUSCIO: Richard Lomuscio on behalf of the
7 plaintiffs.

8 MR. BERKOWITZ: Mark Berkowitz also on behalf of
9 plaintiffs.

10 THE COURT: All right.

11 MS. STURM: And Chandler Sturm on behalf of
12 plaintiffs.

13 THE COURT: Okay.

14 MR. MATHEW: Anand Mathew on behalf of the
15 plaintiffs.

16 THE COURT: Okay. All right.

17 And for defendants?

18 MR. CHENG: Good morning, Your Honor. He Cheng on
19 behalf of defendants.

20 MR. YAO: Good morning, Your Honor. This is attorney
21 Yu-Hao Yao on behalf of defendant third-party respondents.

22 THE COURT: Okay.

23 MR. WANG: This is Wei Wang on behalf of the
24 defendants.

25 MR. LIU: This is Tao Liu on behalf of defendants.

1 THE COURT: Okay. Let's go through a few -- nice to
2 see all of you. I've never seen any attorneys on this case
3 yet. You've all been over the phone so it's nice to see all
4 of you. Let's go through a few ground rules.

5 You could all generally, unless you're examining a
6 witness, you can object or argue from the tables. No need to
7 come up here, but it's absolutely essential you use the
8 microphone. My court reporter can't hear you unless you're
9 using a microphone so make sure the mic is in front of you.
10 They're all adjustable. The base is moveable so just make
11 sure it's there.

12 We're here on plaintiffs' motion for preliminary
13 injunction. I have a couple of preliminary questions.

14 My understanding is that you had completed discovery
15 before Judge Cole; is that correct?

16 MR. LOMUSCIO: Yes, Your Honor.

17 THE COURT: You can stay seated.

18 MR. LOMUSCIO: Oh, I'm sorry.

19 THE COURT: That's fine. That way the mic is right
20 there.

21 MR. LOMUSCIO: Yes, Your Honor.

22 THE COURT: Okay.

23 Defense agrees?

24 MR. YAO: Yes, Your Honor.

25 THE COURT: Okay. Are all efforts to settle this

1 case exhausted?

2 MR. LOMUSCIO: There's always a possibility,
3 Your Honor; but as of the conference, there was no interest in
4 settlement as far as I'm aware.

5 THE COURT: All right.

6 Defendants agree?

7 MR. YAO: Yes, Your Honor. We are open to
8 settlements. However, as Mr. Lomuscio has indicated, there
9 hasn't been any fruitful settlement discussion, I would say.

10 THE COURT: All right. Let's go off the record.

11 (Off the record.)

12 THE COURT: All right. Does either side wish to make
13 an opening statement, brief opening statement, but make an
14 opening statement?

15 MR. LOMUSCIO: We do not, Your Honor. We'd prefer to
16 just go right to witnesses.

17 THE COURT: All right.

18 And defense?

19 MR. YAO: Yes, Your Honor, if I may present my
20 opening statements.

21 THE COURT: Sure. And if you want to do that from
22 the podium, you're free to do so.

23 You want to change your mind?

24 MR. LOMUSCIO: I would like to change my mind if --

25 THE COURT: All right.

opening - plaintiff

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1 Well, hang on. It's their motion so you scared them
2 into it.

3 All right. Proceed. You can do it -- if you're more
4 comfortable standing, just make sure you're at the podium near
5 the microphone.

6 And, again, you're Mr. --

7 MR. LOMUSCIO: Lomuscio, Your Honor.

8 THE COURT: Lomuscio. Got it.

9 OPENING STATEMENT ON BEHALF OF THE PLAINTIFFS

10 MR. LOMUSCIO: And thank you, Your Honor, for
11 scheduling this on such a tight time frame. We appreciate it.

12 Plaintiffs Hangzhou Chic and Unicorn have renewed
13 their preliminary injunction motions to prevent further
14 infringement by defendants Gyroor, Gyroor-US, Urbanmax,
15 Fengchi-US, HGSM, Gaodeshang-US, and Gyroshoes. There's no
16 dispute that the Federal Circuit's decisions vacated the prior
17 preliminary injunctions entered by this Court. It is
18 important to note, however, that the Federal Circuit did not
19 hold that there's no basis for the prior injunctions, only
20 that the form of the order provided by the Court lacked a
21 product-by-product analysis of how the accused products
22 infringed the patents at issue.

23 While plaintiffs believe the record established for
24 the prior preliminary injunction sufficiently established
25 likelihood of success on the merits and irreparable harm and

opening - plaintiff

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1 the Federal Circuit did not hold otherwise, the renewed motion
2 follows the roadmap for issuance of a renewed preliminary
3 injunction now sought by plaintiffs.

4 First, plaintiffs illustrate and will illustrate
5 today how each product infringes the two patents in issue, the
6 '723 and the '256 patent. Mr. Hatch, a patent design expert
7 whom you will hear testimony from today, details how each of
8 the accused products infringe on the patents in issue. You
9 will further hear from Mr. Hatch how the minor details, such
10 as drill holes relied upon by defendants to argue
11 non-infringement, do not insulate the accused products from
12 infringement liability.

13 Second, you will hear testimony today from Richard
14 Bero, a damages expert, regarding the irreparable harm --

15 THE COURT: Let me interrupt you, which I'll do
16 frequently so don't be --

17 MR. LOMUSCIO: Yeah, I'm sure.

18 THE COURT: It's more than the drill holes. It's the
19 shape of the wheel covers. It's the pattern across the pads.
20 I mean, there's a lot of differences that defendants point
21 out, and, you know, the '906 patent seems to indicate, the
22 Fed Circuit seems to indicate, not seems, they held, that's
23 important prior art and it should really focus the analysis on
24 everything other than the hourglass shape which was a big part
25 of Mr. Hatch's report. And, you know, that's how I read the

opening - plaintiff

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1 Fed Circuit decision. We ought to be looking at the
2 hoverboard absent the hourglass shape and all the other
3 features that are in your patents and in their five products.
4 I'll get to whether it's five products or three.

5 MR. LOMUSCIO: Mm-hmm.

6 THE COURT: And that the '906 patent plays a central
7 role in what an ordinary observer is going to have to look at.
8 Look at it absent the hourglass shape and see what the
9 difference is.

10 MR. LOMUSCIO: And you will hear the testimony today
11 that Mr. Hatch describes how you have to look at the entire
12 product, the entire impression for the observer standard.

13 THE COURT: You do.

14 MR. LOMUSCIO: Okay.

15 THE COURT: But you've got to include, in essence,
16 the prior art and take that out of your observation, at least
17 as a distinguishing feature, or a feature that is similar to
18 the accused products because that is prior art. And I read
19 the Fed Circuit case as making it pretty clear that's -- it's
20 highly -- here's what they said: "The '906 patent is highly
21 relevant to the question of infringement because it discloses
22 an hourglass shape, a prominent feature common to the asserted
23 patents and most of the accused products and a feature relied
24 upon by the plaintiff to establish substantial similarity."
25 And then they note: "The Hatch report is far from recognizing

opening - plaintiff

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1 that the hourglass figure of the asserted patents could not be
2 relied on to establish substantial similarity improperly
3 relied upon that feature to show substantial similarity. The
4 Hatch reports did not support a finding of substantial
5 similarity." The Court even continued: "Even a cursory
6 review of the four accused products shows that they are
7 different from each other, display features not found in the
8 asserted patents and lacked features shown in the asserted
9 patents."

10 So it really I think the Fed Circuit certainly seems
11 to indicate the hourglass shape is a background feature that
12 should be disregarded in analyzing infringement in this case.

13 Now, I know Mr. Hatch has a revised report, and he's
14 going to testify. But I hope that -- I'm sure he's read the
15 Fed Circuit opinion, and I hope that is something he addresses
16 in his testimony.

17 MR. LOMUSCIO: That will be, Your Honor. And that is
18 one of the -- there are two points really, Your Honor. One is
19 we think the Federal Circuit misread part of Mr. Hatch's prior
20 reports; but even the current report which builds upon the
21 prior report and he'll go through today points out how there
22 can be confusion with regard to these particular products.

23 THE COURT: Okay. Proceed.

24 MR. LOMUSCIO: Thank you.

25 You will also hear in addition to Mr. Hatch, you will

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1 hear testimony from Mr. Richard Bero regarding the irreparable
2 harm suffered by defendants and that will be suffered by
3 defendants through the pendency of this litigation if there's
4 not an injunction entered. And this is a point apparently
5 conceded by defendants in their opposition papers given their
6 failure to even reference Mr. Bero's report.

7 THE COURT: I'm not sure -- well, perhaps.

8 MR. LOMUSCIO: Right.

9 THE COURT: It's still your burden of proof.

10 MR. LOMUSCIO: Yeah, I totally understand,
11 Your Honor.

12 THE COURT: And whether they contest it in their
13 response brief or not, I have to be satisfied by a
14 preponderance standard you've met that particular element --

15 MR. LOMUSCIO: Of course, Your Honor.

16 THE COURT: -- seeking a preliminary injunction.

17 MR. LOMUSCIO: Of course, Your Honor. That's why
18 you'll hear from Mr. Bero today.

19 THE COURT: All right.

20 MR. LOMUSCIO: Third, it's apparent from defendants'
21 papers that they have no viable rhetoric to plaintiff's
22 *prima facie* showing of infringement. The two experts
23 defendants proffer with their opposition papers provide
24 contradictory testimony regarding infringement and concede
25 that they never reviewed the accused products prior to issuing

opening - plaintiff

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1 their reports. In fact, defendants make no factual showing at
2 all, either through affidavits or testimony, and improperly
3 rely on attorney supposition in their papers. Such
4 speculation does not and cannot overcome what plaintiffs have
5 demonstrated through their preliminary injunction motion.

6 Finally, defendants gloss over the infringement
7 analysis in favor of presenting a series of procedural attacks
8 they claim undercut the renewed motion. These contentions are
9 directly undercut by the extended record in this case.
10 Contrary to defendants' claims, all parties that plaintiffs
11 seek to enjoin with this motion remain party to this action.
12 Mr. Hatch's supporting declaration for this motion is proper,
13 and the Federal Circuit decisions do not preclude this motion.

14 In sum, plaintiffs are entitled to a preliminary
15 injunction in this case that prevents defendants from selling
16 their infringing products as demonstrated in the moving papers
17 and the testimony the Court will hear today.

18 Thank you very much.

19 THE COURT: All right. Just so before you sit down.

20 MR. LOMUSCIO: Yeah.

21 THE COURT: The parties you are seeking an injunction
22 against --

23 MR. LOMUSCIO: Yes.

24 THE COURT: -- are Gyroor.

25 MR. LOMUSCIO: Yes.

opening - plaintiff

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1 THE COURT: Urbanmax.

2 MR. LOMUSCIO: Yes.

3 THE COURT: U-r-b-a-n-m-a-x. I'm spelling these for
4 my court reporter.

5 MR. LOMUSCIO: Sure. Sure.

6 THE COURT: Fengchi-US, F-e-n-g-c-h-i-U-S, correct?

7 MR. LOMUSCIO: Yes, Your Honor.

8 THE COURT: HGSM?

9 MR. LOMUSCIO: Yes.

10 THE COURT: Gaodeshang, G-a-o-d-e-s-h-a-n-g-U-S?

11 MR. LOMUSCIO: Yes, Your Honor.

12 THE COURT: And Gyroshoes, G-y-r-o-s-h-o-e-s,
13 correct?

14 MR. LOMUSCIO: That's correct, Your Honor.

15 THE COURT: Are those the only defendants you're
16 seeking an injunction against?

17 MR. LOMUSCIO: The only defendants we're seeking an
18 injunction against.

19 THE COURT: All right.

20 MR. LOMUSCIO: I just want to make sure I didn't
21 miss -- I have -- I just -- so your list is the same as mine,
22 Gyroor, Gyroor-US, Urbanmax --

23 THE COURT: I didn't mention -- I didn't hear
24 Gyroor-US.

25 MR. LOMUSCIO: Okay.

opening - plaintiff

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1 THE COURT: Gyroor-US?

2 MR. LOMUSCIO: Gyroor-US, Urbanmax, Fengchi-US, HGSM,
3 Gaodeshang-US, and Gyroshoes.

4 THE COURT: All right. And which products, if we go
5 on the products being listed as Gyroor A through E, I believe.

6 MR. LOMUSCIO: Yep.

7 THE COURT: Which products are you seeking an
8 injunction on?

9 MR. LOMUSCIO: Gyroor A, Gyroor C, and Gyroor E.

10 THE COURT: Okay. Not B or D?

11 MR. LOMUSCIO: Not B or D. B and D remain in the
12 case but are not the subject of this particular motion.

13 THE COURT: Okay. All right. Because I would like
14 defense counsel to address this issue first. Make sure we
15 have the right parties.

16 MR. YAO: Yes.

17 THE COURT: We're not going to do this twice. We
18 have the right parties, the right products and that proper
19 notice is given to the parties that are being sought to be
20 enjoined.

21 MR. YAO: Yes, Your Honor.

22 THE COURT: Anything else?

23 MR. LOMUSCIO: Nothing else, Your Honor. Thank you
24 very much.

25 THE COURT: All right. I'll hear from defense

1 counsel.

2 Are you going to use the -- you can -- oh, I see.
3 You have a PowerPoint.

4 MR. YAO: We have a PowerPoint as well. Can you see
5 that, Your Honor?

6 THE COURT: I have. Have you given this to defense
7 counsel?

8 MR. LOMUSCIO: I have not received it, no.

9 THE COURT: Well, you will see it at the same time I
10 do then.

11 MR. LOMUSCIO: Okay.

12 THE COURT: All right.

13 Please introduce yourself again.

14 MR. YAO: Good morning, Your Honor. This is attorney
15 Yu-Hao Yao appearing on behalf of defendant Gyroor-US.

16 THE COURT: Okay.

17 MR. YAO: Third-party respondents Gyroor, Urbanmax,
18 Fengchi-US, HGSM, Gaodeshang-US, and Gyroshoes.

19 THE COURT: Okay. So with that, I believe every
20 entity plaintiff mentioned you are representing?

21 MR. YAO: Yes, we represent defendant Gyroor-US as
22 well as third-party respondents the other Gyroor, Fengchi-US,
23 Urbanmax, HGSM, Gaodeshang-US, and Gyroshoes.

24 THE COURT: All right. So I count the same
25 defendants they've said are the subject of their potential

1 preliminary injunction. You agree?

2 MR. YAO: Yes, Your Honor.

3 THE COURT: Okay.

4 MR. YAO: The number of defendants and third-party
5 respondents are the same, yes.

6 THE COURT: And the names.

7 MR. YAO: Yes, and the name is also the same as well,
8 yes.

9 THE COURT: All right. And you represent them?

10 MR. YAO: Yes, I do. Yes.

11 THE COURT: And you've had notice of the preliminary
12 injunction?

13 MR. YAO: Yes, Your Honor.

14 THE COURT: And you've responded in writing to that
15 preliminary injunction?

16 MR. YAO: Yes, Your Honor.

17 THE COURT: And you're prepared to respond to their
18 motion today?

19 MR. YAO: Yes, Your Honor.

20 THE COURT: Okay. And then as to the products,
21 Gyroor, we'll call it Gyroor A, C, and E.

22 MR. YAO: Yes, Your Honor.

23 THE COURT: Do you agree those are the products that
24 the plaintiffs are seeking to enjoin?

25 MR. YAO: Yes, Your Honor. And I would also like to

1 point out that Group B, or Gyroor B and Gyroor D are not
2 subject to this preliminary injunction.

3 THE COURT: Correct. And that's what plaintiff has
4 acknowledged.

5 MR. YAO: Yes.

6 THE COURT: Okay. Perfect. I think we're on the
7 same page.

8 Proceed.

9 MR. YAO: All right. Thank you, Your Honor.

10 OPENING STATEMENT OF BEHALF OF DEFENDANTS

11 MR. YAO: So let's -- today we are here because
12 plaintiffs have decided once again to file their frivolous and
13 baseless motion for preliminary injunction and temporary
14 restraining order against defendant and third-party
15 respondents. And so before we start, I would like to just
16 look a little bit at the factual background of this case.

17 So who are the defendants in this case? As I
18 mentioned earlier, I represent defendant Gyroor-US who is the
19 only sole defendant in this case which we also have indicated
20 in our brief. We have third-party respondents who are now
21 subject to this PI motion. We have Gyroor, Urbanmax,
22 Fengchi-US, HGSM, Gaodeshang-US, and Gyroshoes. And as we
23 just confirmed, the accused products, we have Group A product
24 as the only accused product in this case, but nonaccused
25 product which plaintiffs have blindly all lumped together are

1 Group C and Group E products, and as we also mentioned earlier
2 that plaintiffs dropped Group B and Group D products in this
3 proceeding, or they indicated that they are not subject to
4 this motion for a preliminary injunction.

5 THE COURT: Well, you mentioned -- there's nothing in
6 the Fed Circuit decision that rejected the third-party
7 respondents as not being properly before the Court. Whether
8 we technically call them defendants or third-party respondents
9 there's nothing in the Fed Circuit decision that means -- that
10 says they can't be bound by any injunction I grant. Do you
11 agree?

12 MR. YAO: Well, Your Honor, I disagree with you. If
13 we take a look at -- look at the case here we have, so we also
14 filed a motion for clarification which this Court denied as
15 moot after the issuance of the Federal Circuit order. And
16 based on what we've read -- based on our understanding of the
17 Federal Circuit court -- I'm sorry -- Federal Circuit order,
18 the only defendant we have left in this case is Gyroor-US
19 which I can go into details why we believe defendant --
20 Gyroor-US is the only defendant in this case. And in
21 addition, Gyroor -- I'm sorry -- Gaodeshang-US never sold
22 any -- never sold any accused products.

23 So if the Court would want to clarify maybe on the
24 spot as to why our -- since we never had a chance to deal with
25 our motion for clarification, if the Court would like to

1 clarify or give us clarification as to --

2 THE COURT: I don't think it's going to change the
3 scope of what we do today or next week. I think I'll
4 reexamine your motion to clarify. I'll look again at the --
5 how they got into the case as third-party respondents, but I
6 don't think it's going to change in any material way what each
7 of the parties present as evidence.

8 MR. YAO: Okay then.

9 THE COURT: I'm not conceding that an injunction in
10 this case is not going to bind those other parties. And if
11 it's a party that hasn't sold the product, so be it, but that
12 doesn't mean if the injunction is granted that they somehow
13 can sell it.

14 So go ahead.

15 MR. YAO: All right, Your Honor. I would like to
16 give you a little bit as to -- background as to why we are
17 third-party respondents and there's only one defendant in this
18 case. We also provide it in our brief, but I'll give you a
19 little bit more overview as to our view of why there are
20 third-party respondents and only Gyroor-US in this case. So
21 let me go ahead and skip through the slides real quick.

22 THE COURT: You know, and I don't want to interrupt
23 what you have, but the fact is the question of whether these
24 third-party respondents are bound by an injunction or
25 whether -- it's not going to affect the scope of the -- I

1 don't believe at least of the plaintiffs' witnesses as I read
2 the reports. They don't really deal with that, unless I
3 misread them.

4 MR. LOMUSCIO: No, Your Honor.

5 THE COURT: And I'd rather, for the sake of
6 witnesses, get them into court on the stand, direct, cross,
7 and get that over with because none of my questions of them,
8 to the extent the questions aren't asked by the lawyers, are
9 going to impact the question of the third-party respondent
10 versus defendants. I'll give you a chance to argue it, and
11 maybe we end up briefing it further, but I don't think that is
12 going to be a key factor for today. I would rather get to
13 witnesses.

14 Now, what I would like you to address is some of the
15 questions I had for plaintiff which is the -- you know, the
16 '906 patent and how that ought to be read in conjunction with
17 an ordinary observer's view of the accused products.

18 MR. YAO: Your Honor, when we get to that, I'll
19 address the questions you asked to plaintiff about the '906
20 patent and --

21 THE COURT: All right.

22 MR. YAO: -- their patent said.

23 Before we also move on, just to see if you could
24 clarify, as I had mentioned, whether Gaodeshang-US never sold
25 the accused products in this case and plaintiffs failed to

1 provide any evidence as so, and that's -- wondering if the
2 Court would clarify for both parties at this moment as to why,
3 you know, Gaodeshang is still considered a defendant even
4 though it isn't.

5 THE COURT: I'm not clarifying anything on the spot.

6 MR. YAO: Oh.

7 THE COURT: If anything I learned from the procedural
8 history of this case is I need to be careful how I make
9 findings, the absolutely correct instruction from the
10 Fed Circuit on that. And so there will be no decision on the
11 spot about the third-party respondents because it doesn't
12 impact our -- the gist of the witness testimony today which is
13 what I want to get to.

14 So please address --

15 MR. YAO: Okay.

16 THE COURT: -- the issue that I raised with
17 plaintiff. I interrupted him to address that. I'm
18 interrupting you to address that.

19 MR. YAO: All right. So, Your Honor, let's go
20 through -- let me go back to the slide again real quick.

21 So today we -- the patents -- patent-in-suit for this
22 preliminary injunction are as we see here plaintiffs' '723
23 patent and the '256 patent. Those are the only two
24 patents-in-suit for this preliminary injunction. The
25 plaintiffs have voluntarily dropped the other two patents

1 which were included in the previous motion for preliminary
2 injunction which they did not include in this case.

3 THE COURT: Plaintiffs agree with that?

4 MR. LOMUSCIO: We did not drop them from the case,
5 Your Honor, no. We dropped them --

6 THE COURT: You dropped them from the preliminary
7 injunction motion.

8 MR. LOMUSCIO: From the injunction motion, yes, Your
9 Honor.

10 THE COURT: Okay. Understood.
11 Go ahead.

12 MR. YAO: Okay. And as we see here, we also have the
13 prior art, the '906 patent, which plaintiffs' patent claimed
14 designer art based on. So if we could -- let's go ahead and
15 take a view of this model we did.

16 So, Your Honor, could you see the screen?

17 THE COURT: Yes, I can.

18 MR. YAO: All right. So, Your Honor, if you just
19 look at this from the top view, you could see the -- if you
20 could see the fenders on the -- on both the left and the
21 right. You could both see the fenders of the '256 patent as
22 well as the '723 patent are very similar if not the same
23 design as the '906 prior art. And if we just look at the
24 overall impression of the hoverboards, you could clearly see
25 the '256 patent and the '723 patent are substantially similar

1 if not even the same based on the prior art. And if we look
2 at the --

3 THE COURT: Let me interrupt you real quick. The
4 '906 prior art, I thought the fenders were drawn with dotted
5 lines which means they are not claimed. Am I misunderstanding
6 the '906 patent? I thought the key part of the '906 patent
7 that was patentable and therefore is something we should
8 consider as prior art was the hourglass shape, not the
9 fenders.

10 MR. YAO: All right. Yes, Your Honor. You are
11 correct about that. I will also point out the overall
12 impression which we will get into later.

13 THE COURT: Sure. Okay.

14 MR. YAO: But if you look at the hour -- I'm sorry --
15 hourglass shape, it is very substantially similar, if not --
16 but the plaintiffs' '256 patent and '723 patent are very
17 substantially similar if not the same as the '906 prior art.

18 Okay. Paul, if you want to -- I'm sorry -- Peter, if
19 you want to kind of move it around.

20 Your Honor, so if we take a view from this
21 perspective, you could also see the hourglass shape is also
22 very similar between the '256 patent and '723 patent and the
23 prior art.

24 And I'll address the fender issue. The fender was
25 merely disclosed in the '906 patent. But if we just, based on

1 the overall impression and as an ordinary observer which we'll
2 get into later, as an ordinary observer, they would see that
3 the fenders and just the overall shape, as well as the
4 hourglass shape of the '256 patent and the '723 patent are
5 very substantially similar to the '906 prior art which the
6 patents-in-suit, that's what they're based on.

7 THE COURT: Slow down a little bit too, okay?

8 MR. YAO: Oh, sorry.

9 THE COURT: Thank you.

10 So those are lights in the front; is that correct?

11 MR. YAO: Yes, Your Honor. Those are lights on the
12 plaintiffs' hoverboards.

13 THE COURT: Well, those the two patents.

14 MR. YAO: The two patents, but they also have the
15 actual light on their hoverboards, but this is just a 3D
16 drawing.

17 THE COURT: Right.

18 MR. YAO: Yes. So if we look from the bottom view,
19 you could also see the hourglass shape is -- excuse me.
20 Peter, for the '906 patent, could you -- yeah, there we go.

21 So if we look from the bottom perspective, you could
22 also clearly see the substantial similarities here between the
23 '256 patent and the '723 patent as well, as the prior art we
24 could see the shape is very substantially similar which it is
25 clear you can clearly see that, the '256 patent and the '723

1 patent is based on the prior art, '906 prior art.

2 THE COURT: Was '906 disclosed in the '256 and '723
3 patents?

4 MR. YAO: Yes, Your Honor.

5 THE COURT: So this was patented over the prior art?

6 MR. YAO: Yes, Your Honor.

7 THE COURT: Okay. Good. Go ahead.

8 MR. YAO: Yes, Your Honor.

9 Peter, if we could go back to the original.

10 Your Honor, this is our -- this is our patent, the
11 '857 patent, and this is what our accused products, the
12 design, is based on. If you just take a look -- if we take a
13 look at this, I believe just based on this top view and bottom
14 view you could see the hourglass shape differences, very
15 substantially -- it's substantially different from the
16 patents-in-suit, the '256 patent as well as the '723 patent.
17 And --

18 THE COURT: So your products, whether it's the three
19 products that defendants are seeking to enjoin, each one of
20 them practices this '856 patent? Because is the '857 patent
21 really relevant? It's really your product versus their
22 patent. Isn't that the comparison?

23 MR. YAO: Yes, Your Honor. I think it is very
24 relevant because this is what we -- the accused products are
25 based on. Just based on the design, we base our products on

1 our own design. We deny our design does not infringe the
2 patents-in-suit which the plaintiffs claim in this case. And
3 if we go to the next slide, we have --

4 THE COURT: Was your patent -- it looks like it was
5 granted after the two plaintiff patents. Were their patents
6 listed as prior art in your patent application?

7 MR. YAO: I believe so, yes.

8 THE COURT: And the '906 was also listed as prior
9 art.

10 MR. YAO: Yes.

11 THE COURT: Okay. Go ahead.

12 MR. YAO: Okay. Peter, if we could take a look at
13 this.

14 So as we see here, we have the '906 patent with a
15 '256 -- the patents-in-suit, '256. If you just take a look at
16 it, if we want to play real quick, if you just see, they're
17 almost exactly the same similarly to what plaintiffs base
18 their design on as the prior art. If you want, I could replay
19 it for you, Your Honor.

20 THE COURT: No. Well, what is Figure 1? Is that
21 from --

22 MR. YAO: Figure 1 is the -- this is the -- so
23 Figure 1 is the '906 patent, the prior art -- I'm sorry. I'm
24 sorry. This is the '256, and the one on the top is the '906
25 patent.

1 THE COURT: Well, the one on the top is '906.

2 MR. YAO: Yes.

3 THE COURT: But the one on the bottom is --

4 MR. YAO: The Figure 1 is '256.

5 THE COURT: '256.

6 MR. YAO: Yes.

7 THE COURT: Okay.

8 MR. YAO: So if you just look -- look at the
9 substantial similarity between the two, if we kind of combine
10 the two -- Peter, if you want to play again -- you could see
11 how almost exactly the same way the '256 patent is based on
12 the prior art. It's so similar it almost fits perfectly into
13 the design of the '906 prior art.

14 THE COURT: Well, one of the key differences is that
15 '906 does not cover the fenders, the ends, and the '256 which
16 covers it -- and it also doesn't cover any design for the
17 pads. But the '256 has part of its design, the fenders --

18 MR. YAO: If you look at the hourglass shape, that is
19 almost exactly the same.

20 THE COURT: No, I understand. I understand your
21 point. I'm just saying what's the difference in what is
22 patented in '256 that is different from the '906 is the ends,
23 the pads and possibly some other features.

24 MR. YAO: Yes, Your Honor.

25 If we could then -- so before we move on, I would

1 I like to make a correction. The '906 patent was filed earlier,
2 but it was not referenced in the two patents-in-suit.
3 However, '906 is still a prior art to the patents.

4 THE COURT: All right. So '906 was not referenced in
5 '723 and '256?

6 MR. YAO: Yes. But it is still prior art to the two
7 patents.

8 THE COURT: Yeah. Referencing it doesn't change --
9 you know, it's prior art if it came out before. Whether it's
10 relevant prior art is an issue for me or a jury if we got to
11 it, but I understand. But it's not in the -- those two
12 patents. Was it in your patent, any or all three of those?

13 MR. YAO: Yes, Your Honor. Yes.

14 THE COURT: '723, '256, and '906 --

15 MR. YAO: Yes.

16 THE COURT: -- were all in the '857 patent?

17 MR. YAO: Yes, Your Honor.

18 THE COURT: Okay. Very good.

19 MR. YAO: So, Your Honor, what we have here is,
20 again, on the top right here which I just point the second
21 black dot is, again, the '906 patent, and on the bottom right
22 here is the '723 patent. So if we -- as we did, we'll show
23 you the similarity which is almost exactly the same. You
24 could see the hourglass shape of the '723 patent and the '906
25 prior art patent, it's very substantially similar if not the

1 same as well which clearly plaintiffs base their '723 patent's
2 design on the '906 prior art which was -- which is still a
3 prior art to the two patents.

4 And here we also have -- this is the '906 patent.
5 This is the design. And if we have -- if we want to take a
6 look, if we -- as we can see just basically before we put
7 them -- if we put them together, you can also see how the
8 fenders are almost exactly -- are very similar if not the
9 same. They are kind of enclosed. And if we took it -- just
10 look at the two little lines as well as the front view, it's
11 almost exactly the same as well as just given overall shape as
12 well. It clearly can be seen that the '723 patent -- I'm
13 sorry -- the '256 patent is based on the '906 prior art.

14 THE COURT: Well, lower it again where you started.

15 MR. YAO: Oh.

16 THE COURT: As I understand the design patent law,
17 and tell me if I'm incorrect on this, the dotted lines on both
18 ends just don't count. They're not being claimed in '906. So
19 the similarity, I think I raised this point earlier, the
20 similarity may be in the hourglass shape, but the difference
21 is the fenders.

22 MR. YAO: Well, Your Honor --

23 THE COURT: Then we have to compare what is claimed
24 in the '723 and '256 patents as the fenders and other features
25 with the accused products. I don't think '906 really deals

1 with prior art as to the ends of these hoverboards, not when
2 they have dotted lines out there. If I'm wrong on that,
3 correct me; I'm happy to hear it. But --

4 MR. YAO: Well, Your Honor, as I mentioned earlier,
5 the '906 was filed earlier, and it's -- even though it was not
6 referenced in the '256 and '723 patent, it is still a prior
7 art to the two patents which plaintiffs most likely if not
8 they have contemplated at least look at this prior art of --
9 '906 prior art before.

10 THE COURT: I think we're misunderstanding each
11 other. '906 doesn't have to be disclosed in the '723 or '256
12 to be considered as prior art. All I'm saying is '906 doesn't
13 claim the ends of this hoverboard which means that the real
14 focus of today's inquiry ought to be, if there is --
15 plaintiffs think the hourglass shape is something that is
16 different than '906, I think the Fed Circuit said otherwise.
17 But I'm happy to hear argument on that, but I think the key
18 area is --

19 MR. CHENG: Your Honor, if I --

20 THE COURT: Well, let me just finish my thought.

21 I think the key area is what -- what's different.
22 And what's different from '906 in both their patents and then
23 in your products are the coverings on the -- of the wheels,
24 possibly some other features in the body of the hoverboard,
25 but that's my belief as to what the key inquiry is. If that's

1 wrong, I'm happy to hear argument. If your colleague wants to
2 say something -- I'd rather we not double team. Why don't you
3 talk to your colleague and see what he wants to say and then
4 you can come back.

5 MR. YAO: All right. I'll be right back, Your Honor.

6 THE COURT: Sure.

7 (Off the record.)

8 MR. YAO: Well, Your Honor, going back to the fenders
9 point. As you mentioned earlier about the dotted lines on the
10 wheels and the fenders, they're not claiming design. Even
11 though the fenders were not claimed in the '906 patent, it is
12 still considered prior art. It was disclosed and which -- as
13 I indicated, the plaintiffs, when they filed this, their
14 application for the '723 patent, the '256 patent, they had
15 probably, you know, considered this design -- well, at least
16 they looked at it and it was referenced in the '906 prior art
17 and this is what they based it on. But, Your Honor, you have
18 a different reading of what we read from. Each if you just
19 take a look at the hourglass shape, that is very similar, if
20 not the same. The '256 patent is based on the '906 prior art.

21 THE COURT: I understand your argument, and I think
22 the Fed Circuit addressed that too. Go ahead.

23 MR. YAO: Again, if we take a look at the '723 patent
24 as well as the '906 prior art, again, you know, the hourglass
25 shape is very similar if not the same compared to the '906

1 prior art which we could see the hourglass shape. So it is
2 clearly -- it could be clearly seen that plaintiffs, when they
3 filed their patent, the '723 patent as well as the 9 -- the
4 '256 patent, they have definitely looked at this '906 patent.
5 They contemplated about it. And when they filed their
6 application, it can be seen that this -- they base their
7 patents and patenting design on the '906 prior art.

8 So, again, this is the accused products, Group A
9 products, Your Honor. This is -- we also have -- we also
10 brought in an actual hoverboard if we may present it to you,
11 Your Honor, an actual hoverboard.

12 THE COURT: I have one. I'm not sure. I think it's
13 A, down in chambers. Somebody gave it to us early on in this
14 case. But I'm happy to --

15 MR. YAO: May I approach with the hoverboard,
16 Your Honor?

17 THE COURT: The whole thing? Sure.
18 Just put it up here. You could put it up on the
19 bench.

20 And this is product A?

21 MR. YAO: Yes, Your Honor.

22 THE COURT: Okay.

23 MR. YAO: This is Gyroor -- yes, that is group
24 product A. Yes.

25 Your Honor, if we take a look at it which you have in

1 front of your screen as well as next to you the actual accused
2 products in this case. And just -- if we just take a look
3 from -- as an ordinary observer in this case or just overall
4 impression, we could take a look at it, we could see how the
5 hourglass shape are very substantially different from
6 either -- from the top view, the front view, the bottom view,
7 as well as the back view. And it's just so substantially
8 similar that plaintiffs cannot claim infringement if we -- of
9 the '723 and '256 patent of accused product A.

10 And here we have accused product C which we are -- if
11 I could also approach you with it.

12 THE COURT: And is the color difference --

13 MR. YAO: (Unintelligible.)

14 THE COURT REPORTER: I'm sorry. I couldn't hear
15 anything you said.

16 THE COURT: Yeah, go back to the mic.

17 My question was there's the PowerPoint for what is
18 product C, it has a pink color. The one you -- that the
19 demonstrative you gave me, or the example you gave me is black
20 color. But I take it the colors are irrelevant to any
21 considerations we have?

22 MR. YAO: You are correct, Your Honor. The color
23 does not have any difference. The only thing is we don't have
24 any pink in stock so we brought a black one; but other than
25 that, there are no relevance.

1 THE COURT: Fair enough.

2 MR. LOMUSCIO: Your Honor, we do have a pink one if
3 the time comes.

4 THE COURT: If it's the same product, the color is
5 not anything that's the subject of controversy in this case.

6 MR. YAO: Your Honor, if you want I could show
7 plaintiffs an actual product which we brought today if they
8 think that the color difference might make a difference.

9 THE COURT: Is anyone contending the color difference
10 is part of any claim that is a basis for infringement?

11 MR. LOMUSCIO: No, Your Honor. I was just simply
12 noting that if you did want to see a pink one, we have one.

13 THE COURT: I don't.

14 All right.

15 MR. YAO: As you can see on the screen, Your Honor,
16 we have the accused product C which is called Gyroor T580
17 which you also have next to you, you can see -- as you can
18 also clearly see that from the top, front, bottom, back view,
19 the hourglass shape is very substantially -- I'm sorry -- is
20 very substantially different compared to the patents-in-suit.
21 Even with the back we have the little microphones as well as
22 the ventilation holes. It's so substantially different which
23 as an ordinary observer it is -- they could clearly see that
24 our accused product, Group C, does not infringe the '723 and
25 the '256 patent.

1 THE COURT: Well, your point is -- as I understand it
2 is that if we essentially look at these products, take away
3 from them or disregard the hourglass shape because it's prior
4 art, '906 prior art, the differences I ought to be looking
5 at -- I may have asked this question four or five different
6 ways but I'm asking it again. The differences I ought to be
7 looking at is how is your product different than the '723 and
8 '256 patents if I disregard the hourglass shape?

9 MR. YAO: Yep. Well, it's also clear you can see the
10 fenders are much different.

11 THE COURT: Well, that's my point. Yeah.

12 MR. YAO: You see --

13 THE COURT: I mean, that's what I ought to be looking
14 at. Now, plaintiffs may disagree, and I'm going to hear from
15 Mr. Hatch. But I'm trying to get a handle on what the key
16 contested issues are.

17 MR. YAO: You will also hear from one of our experts,
18 Mr. Gandy, later about how the accused products' design
19 infringe any of the two patents-in-suit.

20 We have the third nonaccused products is the Gyroor
21 G11, or as we call it, the Group E products which we also
22 have -- which we brought one today which if I may approach?

23 THE COURT: Yes. What was the number on the first
24 one, the A product, by the way?

25 MR. YAO: It's T581.

opening - defendant

35

1 THE COURT: 581?

2 MR. YAO: Yes.

3 THE COURT: Okay. All right.

4 MR. YAO: And this one, the G11, is the Group E
5 products.

6 THE COURT: All right. Thank you.

7 Okay.

8 MR. YAO: Your Honor, as you can see in front of you,
9 next to you, we have the Group E accused products, the Gyroor
10 G11. Again, from the top, front, bottom and back view, we
11 could clearly see that the hourglass shape are substantially
12 different. Again, also we don't have the ribs toward here in
13 the which I'll circle here. You can see the ribs different
14 when you compare it with the plaintiff's patents-in-suit, the
15 '256 patent as well as the '723 patent. And if you look at
16 this design of the hourglass shape, we also have different
17 line designs which we'll go into later which is very
18 substantially different from the patents-in-suit as well.

19 THE COURT: Okay.

20 MR. YAO: So to give you a little bit of overview of
21 procedural history as to why we are here today again and why
22 there are third-party respondents and only defendant
23 Gyroor-US.

24 THE COURT: Let's deal with that later.

25 MR. YAO: Oh.

1 THE COURT: I'm happy to see your PowerPoints on that
2 one, but I think we need to start hearing from witnesses. I
3 don't want to have a closing argument before we start hearing
4 evidence.

5 MR. YAO: There's one thing that I would like to
6 point out. There's a factual mistake in the plaintiffs'
7 motion on page 12 of their -- it's Docket 592. Plaintiffs
8 said that none of the relevant prior art creates the same
9 visual impression of the patents, namely the integrated
10 hourglass body with a relatively flat surface across the top
11 of the main body. This is actually -- both features were
12 disclosed in the '906 patent.

13 THE COURT: Okay.

14 MR. YAO: And, Your Honor, I'll close my opening
15 statement with this. As we all know, we are here today for a
16 preliminary injunction hearing. The burden of proof is on
17 plaintiffs, or the movant, to prove that they will be -- they
18 have a likelihood of success on the merits as well as they
19 will be irreparably -- I'm sorry -- irreparably harmed if the
20 injunction would not be in place. As plaintiffs have pointed
21 out, their expert, Mr. Bero who will testify later, his report
22 is deficient, contains no analysis whatsoever of any causal
23 nexus that is required or any lost sales that plaintiffs
24 contend. And even if plaintiffs did claim. A lost sales
25 injunction does not remedy lost sales. It's clearly

1 compensatable with monetary damages.

2 In addition, the irreparable harm to defendant would
3 be much greater if the injunction would be in place compared
4 to the plaintiff.

5 In addition, plaintiffs also in their reply brief
6 does not address any of the oppositions -- opposition in
7 response that we put in our brief regarding the loss of
8 harms -- the loss of sales as well as any -- loss of market
9 share which is required to prove this patent -- to prove --
10 for injunction.

11 In addition, having an injunction in place just
12 because defendants and third-party respondents are direct
13 competitors goes against public policy and goes against the
14 heart of free market and capitalism and as you will hear later
15 today with our expert, Mr. Gandy, as to why there are no -- no
16 claims of likely -- no claims of infringement in this case.

17 THE COURT: All right. Thank you.

18 MR. YAO: Thank you.

19 THE COURT: All right. Plaintiffs may call their
20 first witness.

21 MR. BERKOWITZ: Plaintiffs would like to call
22 Mr. Paul Hatch.

23 THE COURT: All right.

24 Mr. Hatch.

25 (Witness sworn.)

Hatch - direct by Berkowitz

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1 THE COURT: You may begin.

2 PAUL HATCH, PLAINTIFFS' WITNESS, DULY SWORN,

3 DIRECT EXAMINATION

4 BY MR. BERKOWITZ:

5 Q. Good morning, Mr. Hatch.

6 A. Good morning.

7 Q. Could you state your full name for the record.

8 A. Yes. I am Paul Hatch. I reside here in Chicago.

9 Q. Okay.

10 THE COURT: Is the microphone on? Is there a green
11 light there on the bottom?

12 THE CLERK: It's on now.

13 THE COURT: It's on now. Okay. All right.

14 Okay. Go ahead.

15 BY MR. BERKOWITZ:

16 Q. Could you tell us what has been your role in this case up
17 through now?

18 A. Yes. I've been engaged by plaintiffs to review the
19 patents and to analyze this case of design patent
20 infringement.

21 Q. And what is your understanding as to who the plaintiffs
22 are?

23 A. The plaintiffs are Hangzhou Chic and Unicorn Global.

24 Q. Okay. And do you understand the relationship between
25 those two parties?

1 A. Yes. I believe Hangzhou Chic is the manufacturer and the
2 owner of the patents in question, and Unicorn Global is a
3 licensee and has the license to distribute the product here in
4 the U.S.

5 Q. And when did you first start working on this case?

6 A. I started in 2020.

7 Q. And since that time, have you provided any other testimony
8 in this case?

9 A. Yes, I have. I provided testimony for the first
10 preliminary injunction in 2020. I also wrote a declaration in
11 2021 for the second preliminary injunction. I also provided
12 testimony and reports during discovery which was summer this
13 year and of course have provided a declaration in this current
14 preliminary injunction.

15 Q. Okay. Thank you.

16 Could you tell us about your current employment?

17 A. Yes. I am currently undertaking a Ph.D. in the learning
18 sciences at the University of Illinois at Chicago.

19 Q. Okay. So are you not currently employed?

20 A. I'm not. I recently retired from my employment.

21 Q. Okay. So before we go to the employment, could you tell
22 us a little bit about your current Ph.D. work?

23 A. Yes. So learning sciences involves looking at psychology,
24 technology, and education. It's essentially about how people
25 perceive things and how people learn. And it's been an area

1 of interest of mine for many years, so I decided to go the
2 full route with this for the next six years.

3 Q. Okay. And when did you start that program?

4 A. I started in 2020.

5 Q. Okay. And prior to 2020, were you employed?

6 A. Yes. I was the CEO of Teams Design.

7 Q. Okay. Can you take us back to your education post high
8 school?

9 A. Yes. My undergraduate degree was in industrial design
10 which was at the University of Northumbria in the UK.

11 Q. And what kind of coursework did you engage in while you
12 were doing your undergrad?

13 A. Within industrial design, we learned a range of things,
14 obviously drawing techniques, understanding about manufacture,
15 engineering, a lot about how to design and how people perceive
16 those designs. And ergonomics, for instance, is a very big
17 part of it.

18 Q. Okay. And when did you complete your undergraduate
19 training?

20 A. That was 1993.

21 Q. Okay. And after 1993, did you begin working?

22 A. Yes. I began at -- I moved from Germany from the UK, and
23 I began employment at Teams Design in Germany.

24 Q. What was your role at Teams Design, at least initially?

25 A. So I started as a junior designer and became senior

1 designer after a number of years. And at the point of about
2 five years, the company wanted to open up a branch in the U.S.
3 and selected me to open it up for them which I did in 1998
4 here in Chicago.

5 Q. Okay. And before we get into your specific role, can you
6 tell us a little bit about what Teams Design does in general?

7 A. Yes. So Teams Design is an industrial design consultant.
8 So by that role, they consult with manufacturing companies
9 that make consumer products, make industrial products, who
10 have brands, and essentially provide industrial design
11 services. So that covers undertaking research to understand
12 consumer needs, ideation, creating new ideas, problem solving,
13 and then designing the products, that is the look and feel of
14 the products, to -- all the way from sketch, through
15 computer-aided design, through into engineering, and very
16 often we would follow it through manufacture. We wouldn't do
17 the actual manufacture ourselves, but we would walk the shop
18 floor to make sure things are working out.

19 Q. Okay. Could you give us some examples of some of the
20 companies that Teams Design works with?

21 A. Yes. So we became one of the largest design
22 consultancies, industrial design consultancies in the world,
23 so we were lucky to be able to work with some of the largest
24 corporations as well. So we designed a lot with Bosch and
25 with Samsung; with Chrysler, the automobile company, for

1 instance; with Siemens.

2 Q. And did you yourself work with those particular companies?

3 A. Yes. Yes.

4 Q. And could you tell us a little bit more about your role I
5 guess in working with those companies?

6 A. So I was engaged from start to finish on all of the work
7 we did. Obviously I had a number of staff. We reached almost
8 30 people at one point, in Chicago that is, and of course had
9 multiple branches. However, I was involved right to the end
10 until I retired in going out into user research and to
11 people's homes, understanding their needs, in guiding the
12 design and guiding the ideas and the development, essentially
13 all the stages.

14 THE COURT: Hang on. Let's go off the record for a
15 moment.

16 (Off the record.)

17 THE COURT: All right. Are we still missing some
18 people?

19 MR. YAO: We're missing my colleagues.

20 THE COURT: We'll wait until they're back.

21 (Off the record.)

22 THE COURT: All right. Okay to begin?

23 MR. YAO: Yes.

24 THE COURT: Here we go. It looks like we have
25 everyone here.

1 All right. You may continue your direct examination.

2 MR. BERKOWITZ: Thank you.

3 BY MR. BERKOWITZ:

4 Q. So when we left off, Mr. Hatch, you had told us a little
5 bit about your -- some of the types of work that you had done
6 while at Teams Design.

7 Could you tell us a little bit more about the
8 specific products that you worked on while at Teams Design,
9 and in the interest of time, some of the -- as they relate to
10 the types of products at issue here in this case.

11 A. Yes, of course. And I did work on a number of consumer
12 products. That was about 50 percent of our business. And
13 related to the products in this case, I also worked on a
14 number of self-balancing vehicles, that is one of our clients,
15 for instance, had an entire department that was dedicated
16 towards devices of mobility as they called it. And so we
17 worked on redesigning some segway devices. And segways, for
18 those who might not know, came out --

19 THE COURT: I know what they are.

20 THE WITNESS: Yes, thank you.

21 And essentially we were redesigning it for use in
22 certain spots in other areas. So we were creating a different
23 look and feel and making it more applicable to the target
24 area.

25 And we also worked on some electronic bikes, for

1 instance, even some single-wheeled self-balancing devices as
2 well.

3 BY MR. BERKOWITZ:

4 Q. Okay. Thank you.

5 So let's jump in. I know you said earlier that you
6 were retained in this case to provide opinions. Could you
7 tell us what types of opinions that you've been asked to
8 provide here?

9 A. Yes. I was asked to analyze the patents and the accused
10 products, and so looking to -- at the area of infringement.

11 Q. Okay. And what is your understanding of a patent?

12 A. So there are two main types of patent, utility and design
13 patent of course. And as I understand, it offers protection
14 for the inventor, that is it precludes someone from infringing
15 on their invention.

16 Q. And what types of patents are at issue in this case?

17 A. So in this case, we have four design patents that we're
18 looking at.

19 Q. Okay. And today, how many patents are we here to talk
20 about?

21 A. So in the preliminary injunction here today, we're looking
22 at just two of those four patents.

23 Q. Okay. And which two of those patents are we here to talk
24 about?

25 A. It's -- I do have some slides, but the patents themselves

Hatch - direct by Berkowitz

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1 are the -- what we've called the '723 and the '256.

2 Q. Okay.

3 MR. BERKOWITZ: We do have some slides that Mr. Hatch
4 prepared. Can we bring them up on the screen?

5 THE COURT: Yes. And have you shared these with the
6 defense?

7 MR. BERKOWITZ: Not yet, but we do have paper copies
8 that we can mark.

9 THE COURT: Yeah. Why don't you give a paper copy to
10 my law clerk if you've got -- and me, and then defense, of
11 course.

12 MR. BERKOWITZ: May I approach?

13 THE COURT: Yeah, through my courtroom deputy,
14 please. Thank you.

15 All right. You may proceed.

16 MR. BERKOWITZ: I'm just going to bring it up on the
17 screen.

18 THE COURT: All right.

19 Is it properly connected at your table?

20 MR. LOMUSCIO: It appears to be connected, yes.

21 THE COURT: All right. Did you test it out before
22 the hearing? Was it working then, or do you know?

23 MS. STURM: Do you know?

24 MR. LOMUSCIO: We weren't able to.

25 THE COURT: Okay. Then here's what we'll do. We'll

1 call the IT department to come up and work on it, but in the
2 meantime, we all have paper copies. Does the witness have
3 one?

4 MR. BERKOWITZ: No.

5 THE COURT: Let's give him one, and then we can work
6 off of the same -- it's numbered pages. We'll work off the
7 same documents.

8 And then, Emily, will you ask somebody to come up?

9 THE CLERK: Yes.

10 THE COURT: Thank you.

11 We'll have someone come up and solve that, but in the
12 meantime, we'll all work off the paper copies. Alternatively,
13 I think you can do a hookup off your computer on the deck here
14 might work.

15 MR. BERKOWITZ: I can try that.

16 There we go.

17 THE COURT: All right. Very good. So you're going
18 to ask the questions and push the slides, but I'm sure you can
19 do that.

20 MR. BERKOWITZ: I'll give it a shot if I can get it
21 to work. Let's just move forward.

22 THE COURT: I think your colleague may put another
23 laptop up there.

24 THE WITNESS: Yes, there we go. Third time's a
25 charm.

1 MR. BERKOWITZ: Thank you.

2 THE COURT: You may proceed.

3 MR. BERKOWITZ: Yes.

4 BY MR. BERKOWITZ:

5 Q. Okay. So before that little glitch, we were talking about
6 the two patents that are asserted in this case?

7 A. Yes, that's correct. So on this slide, we see the two
8 patents which I will continue to refer to as the '723 and the
9 '256. We see they are both from the same inventor, and they
10 were filed at the -- I'm sorry. They were -- the date of the
11 patent -- I'm sorry. They were filed at the same time.

12 Q. Okay. By the same time, what do you mean?

13 A. On the same date. They were literally filed on the same
14 date even though the date of the patents, it differs between
15 them.

16 Q. Can you tell us a little bit about the type of information
17 that's shown on the cover of the patent?

18 A. So we see, first of all, the title of the patent; in this
19 case, the self-balancing vehicle.

20 On the -- towards the bottom right, we also see the
21 claim and the description which we've got on the next slide
22 highlighted. So, for instance, on the '723 here, we can see
23 the title, the self-balancing vehicle, the filing date and the
24 issue date. Importantly, it was filed in 2014.

25 On the next slide, we can see the claim and

1 description. And being a design patent, the claim here refers
2 directly to the figures.

3 Q. Okay. And how many figures are claimed and disclosed in
4 the '723 patent?

5 A. There are eight figures. And in the description, it
6 provides a description of exactly which angle each of those
7 figures represents.

8 Towards the bottom, we can see highlighted in yellow
9 pointing out that the broken lines are shown for purposes of
10 illustrating, that is environmental, it provides context, and
11 those are items that are not part of the claimed design.

12 Q. Was there a reason that you highlighted that for us?

13 A. Yes, it's just important to know that as we look at the
14 figures that there are certain elements that are unclaimed as
15 part of that patent.

16 Q. Okay.

17 A. And so the next few slides we show some detailed images of
18 the patent. I'll only go through those briefly for brevity.

19 But essentially we see in Figure 1, there are some
20 areas that are unclaimed. There we see the O and the I that's
21 part of the foot tread area. Also towards the very middle of
22 the product there's some dotted lines showing some unclaimed
23 markings on the buttons.

24 And we also see on both drawings, Figure 1 and 2, the
25 hubs of the wheels are unclaimed. And on Figure 2 we see the

1 tread of the wheels, that is the wheels as a whole are shown
2 with broken line, and, therefore, are unclaimed.

3 Q. Could you tell us a little bit about how you take into
4 account what's claimed and unclaimed when performing a design
5 patent analysis?

6 A. Yeah. The unclaimed matter, it is important to understand
7 the context that it's providing so that's why it's included in
8 drawings like this.

9 However, if it's unclaimed, that is shown through the
10 dotted lines, this is not part of the claim of the design.
11 That is the protected part of the design.

12 Q. Okay.

13 A. We can go to the next figures maybe on the next slide.
14 We've got Figure 3 and 4. And there we're seeing the rear
15 view, straight on, and the front elevation, as is typical with
16 patents with seeing very specific views.

17 We also see some unclaimed matter here, what appeared
18 to be screw buses. We see the hubs and the wheels are
19 unclaimed. And of course there's some -- on the front
20 elevational drawing there's a button and probably a charging
21 port that are marked in dotted lines as well.

22 Q. Okay. And, again, those claimed versus unclaimed
23 features, are those taken into account during the analysis?

24 A. They're part of the consideration of the design as a whole
25 because it's giving us context, but it is not part of the

1 claimed part, the protected part of the design.

2 Q. Okay.

3 A. On the next slide we've got Figure 5 and 6, 5 showing an
4 end view, or left-side view, I should say, and it does point
5 out in the description that the right side is a mirror image
6 of the same. And there we do see obviously the open fender
7 that we see wrapping over the top of the wheel. And the wheel
8 itself and the hub cap are all marked as unclaimed.

9 And Figure 6 we see a nice angled view. In this case
10 it's the rear top right perspective of the design, and we see
11 the same elements that we've covered in the other views that
12 are marked as unclaimed.

13 Q. Okay.

14 A. Then finally, on the next slide where we see Figure 7 and
15 8, excuse me, two more angled views. On the left there,
16 Figure 7, we're seeing a front top/left perspective, and,
17 again, we're seeing the unclaimed matter that aligns with what
18 we're seeing on the other images.

19 And Figure 8, we're looking from an angled view from
20 below.

21 Q. Before we move on to the second patent, are there
22 particular views that are more important than others?

23 A. No. When analyzing or understanding what's claimed here,
24 it's important to look at all of the views to understand the
25 design as a whole. It would be wrong to look at one specific

1 view and make inferences based on one view alone.

2 Q. Okay. And could you sort of run through the same analysis
3 for -- the same description for the '256 patent?

4 A. Yeah, absolutely. I'll be a little bit more brief as well
5 in the interest of time, but we also see here as the same
6 title, as self-balancing vehicle. It was also filed on the
7 same date here in 2014 which it lays claim to and -- I'm
8 sorry -- priority to.

9 And on the next slide, we see also zoomed in to the
10 claim and description, the claim again and description
11 referring directly to the figures. We also have eight
12 figures, and the descriptions are very similar here. And it
13 also calls out that the broken lines form no part of the
14 claimed design.

15 THE COURT: What is the essential difference between
16 those two patents? Is there something you can point to in a
17 particular figure that is different from one to the other?

18 THE WITNESS: Yes. Maybe if we go to the third
19 slide, the angled view, we get a good view.

20 THE COURT: What page would that be? Go ahead.

21 THE WITNESS: I'm sorry. I think it's the scene we
22 could look at there. So there are a lot of similarities
23 between the two patents. There are some differences we can
24 see in even the unclaimed areas here. The design of -- there
25 are some differences around the design of the form as it comes

1 to the -- towards the fenders and the treatment of the fenders
2 themselves.

3 The unclaimed wheels appear a little different here
4 and some differences in the treatment of the -- of the
5 pronounced footing areas.

6 But all in all, there's a lot of similarities. They
7 were both filed on the same date, and they were both granted a
8 patent independently from each other.

9 Q. And just to clarify, you were looking at Figure 6 as you
10 were providing that description?

11 A. Yes. Thank you.

12 And so. Yes, we have similar angles for the rest of
13 the patent here. We have Figure 7 and Figure 8 as well.

14 Q. Are there any other differences that you would like to
15 call out between the '256 and the '723?

16 A. Yeah, there are some differences in smaller details when
17 we look at the lighting areas, for instance, which we see on
18 Figure 7 and Figure 8. There are some differences in the
19 center of the body as a whole. But these are design
20 differences. They do contribute to the overall impression,
21 but the -- they -- well, yes. That's it. Thank you.

22 Q. Okay. And we've now covered the two patents that are
23 asserted in this case. I would like to move on to the accused
24 products.

25 Would you -- in general in this case, how many

1 different accused products are there?

2 A. So there are five accused products, but here for the
3 preliminary injunction we're looking at just three of those,
4 as was mentioned earlier today. There is the -- what I show
5 on the slide here, the Gyroor A, C, and E. And we already
6 have physical samples, I believe, to the left of the bench
7 here.

8 Q. Okay. And did you bring your own samples with you today?

9 A. I did, yes. And actually these are the samples I used
10 when I was analyzing the products itself. It was very useful
11 to be able to look at the products in person rather than
12 through photos.

13 Q. Okay.

14 A. It's a little less deceiving that way.

15 Q. Okay.

16 THE COURT: Do you practice the patent on the -- this
17 is more to the attorneys, and if the witness can answer, fine,
18 but does the plaintiff practice the patents? In other words
19 do you have products that are identical to the patents so I
20 can actually do a -- rather than comparing a drawing to the
21 Gyroor products, I could compare a plaintiff product to the
22 Gyroor product as long as the product for the plaintiff is
23 identical to the patent?

24 MR. BERKOWITZ: We don't have a sample of our product
25 with us. We do --

1 THE COURT: All right. And it's irrelevant unless
2 you actually practice the patent.

3 MR. BERKOWITZ: I believe we do. But, yeah, the
4 analysis is the drawings against the accused product.

5 THE COURT: All right. Well, you've got my question.
6 We'll address it later. But it's an easier side-by-side
7 comparison if you're looking at two hoverboards as long as
8 the -- and it's not the analysis unless your hoverboard, the
9 plaintiffs' hoverboard, is identical to the claimed drawings
10 in the patent.

11 MR. BERKOWITZ: Okay.

12 THE COURT: So anyway, go ahead.

13 MR. BERKOWITZ: I would like to mark each of the
14 three hoverboards as exhibits, if that's all right.

15 THE COURT: Sure. Why don't you -- just call them
16 plaintiffs' --

17 MR. BERKOWITZ: I was going to do 1, 2, and 3.

18 THE COURT: That's fine. Plaintiffs' 1, 2, and 3,
19 and I will consider these ones, the ones provided to me by
20 defendants, Defendants' 1, 2, 3, 1 being Gyroor A, 2 being
21 Gyroor C, and 3 being Gyroor E.

22 MR. BERKOWITZ: Okay.

23 BY MR. BERKOWITZ:

24 Q. So, Mr. Hatch, could you just give us an overview of the
25 accused products?

1 A. Yes. As we can tell, they are very, very similar to each
2 other, and they are all self-balancing vehicles, as is the
3 patent description. And they are marked as hoverboards.

4 Q. Okay. So we've talked about the asserted patents. We've
5 identified the three accused products. Can you in general
6 walk us through your methodology in making an infringement or
7 non-infringement analysis for design patents?

8 A. Yes. So very briefly, the stages that I would go through,
9 first of all, would be claim construction. That is by looking
10 at the design patents themselves, looking at what's claimed,
11 understanding what's unclaimed, and getting a good sense of
12 the design as a whole which is the important first step.

13 Excuse me.

14 Following that, it's important to identify who the
15 ordinary observer would be for this particular case which I'll
16 get on to shortly, and is essentially our understanding of the
17 ordinary observer is informed in part by understanding the
18 actual purchaser of the accused product.

19 The next stage I would go through, one should go
20 through is to understand the prior art, to look at the prior
21 art of the invention at the time, at the specific time. And
22 that gives some understanding as to how novel the design was
23 at the time, what existed before it and the real context of
24 the design that we're looking at through the figures.

25 Following that, conducting two stages of infringement

1 analysis or the ordinary observer test, the first of which
2 we -- we do a direct comparison between the accused products
3 and the patent to the drawings of the patent and the design as
4 a whole. And the second -- in that first stage, we look
5 broadly to see if they are plainly dissimilar or not.

6 Given that then we move on to the second stage where
7 we then bring in the prior art and view it through the eyes of
8 the ordinary observer to understand if the accused products in
9 the patent are closer than they are to the -- closer to each
10 other than they are to the prior art.

11 Q. Okay. So now let's take the next step and apply that
12 methodology to the particular patents and products in this
13 case.

14 So you said the first step was construing the claims.
15 Could you tell us how you went about doing that in this
16 particular case with respect to each of the patents?

17 A. Yes. So essentially looking at the claimed design and
18 understanding what's unclaimed; as we kind of walked through
19 before, looking at the patents and also as part of my analysis
20 looking at the file history to see if there's any other
21 signals there that may give us further indication.

22 Q. In this particular case, was there anything of note in the
23 file histories?

24 A. No, there wasn't. The designs were accepted for the
25 patent.

1 Q. Is that the case for each of the asserted patents?

2 A. That's correct, yes.

3 Q. Okay. So step 1 is construe the claims. You said that
4 step 2 was to define the ordinary observer; is that correct?

5 A. Yes, that's correct.

6 And so I believe the next slide, I -- yes, we can
7 talk briefly about the ordinary observer. This is important
8 to understand because the viewpoint in looking at the figures
9 has to go through understanding the viewpoint of the ordinary
10 observer. This is a hypothetical person. So to read the top
11 lines here and not all of it, but the ordinary observer is one
12 who is not an expert in the claimed designs but rather one of
13 ordinary acuteness who is a principal purchaser of the
14 product.

15 And so first of all, as part of the process, we look
16 to, okay, who is the purchaser of the accused product. And
17 based on my experience in this case, I defined that that would
18 be a consumer user or the parents of the user, each having
19 little or no experience purchasing hoverboards.

20 We use that information about the purchaser to
21 understand the level of acuity or attention that that person
22 pays to the design and the details of the product itself.

23 THE COURT: What is the basis of your conclusion that
24 the consumer user would have little or no experience
25 purchasing hoverboards? And if you're coming to that in your

1 outline, you can wait until you get to it; if that's not in
2 your outline --

3 MR. BERKOWITZ: Now is a good time.

4 THE COURT: All right. Go ahead.

5 THE WITNESS: No, it's a good question. Based on my
6 experience, it's clearly a consumer product. And seeing how
7 it's retailed, for instance, chiefly online in stores like
8 Amazon, there are some brick-and-mortar stores where it's
9 retailed like Best Buy and Walmart, and the way it's presented
10 certainly speaks to their attracting attention to the
11 consumer. And price point and features seem to be the
12 prominent items that are being presented.

13 So in many years I've worked with consumers,
14 conducted user research to get an understanding of how they go
15 about purchase habits and how they look at products. And so
16 based on that experience and seeing everything that I have
17 here, it looks like the purchaser is not going to have an
18 intricate knowledge of all the nooks and crannies and styling
19 details of the particular designs.

20 BY MR. BERKOWITZ:

21 Q. And I think you touched on this before, but can you
22 explain a little bit more about the interplay between this
23 principal purchaser and how you use that in connection with
24 the ordinary observer?

25 A. Yeah. I think that's very good to explain. Actually I've

1 created a diagram on the next slide because it's often
2 misunderstood.

3 The hypothetical ordinary observer we understand to
4 have knowledge of all the relevant prior art. So in this
5 case, they have knowledge of the prior art that's cited. They
6 would have knowledge of the '906, of course, because it was
7 invented at around the same time.

8 And so this hypothetical ordinary observer has
9 knowledge that those exist but the question remains how much
10 attention do they pay when they're looking at those designs,
11 if -- whether they, for instance, have intricate detail
12 inspection of the designs or whether it's more of a fleeting
13 glance.

14 And so to find that out, that's where we use and
15 refer to the principal purchaser. We understand the level of
16 attention that they apply and use that to construct our
17 hypothetical ordinary observer.

18 THE COURT: Is there evidence that both the -- again,
19 if -- that these products are sold in brick-and-mortar stores
20 at the same time? In other words, there's a Gyroor product
21 and a plaintiff product in a Walmart or in a Best Buy where a
22 person, an ordinary observer, could actually physically
23 compare the two, and whether they're boxed so that all they
24 would see is a picture anyway, they couldn't even hold up each
25 one to do a comparison? Are you aware of that fact or that

1 factor being present here?

2 THE WITNESS: That was not part of my analysis as I
3 strictly have to look at how the patent is representing the
4 design as a product and its packaging may actually infer other
5 qualities that the patent doesn't have.

6 THE COURT: Okay. No, I understand. And it goes
7 back to my question of whether there's actually a physical
8 product of the plaintiff that practices the patent that would
9 be something that a person online would look at, look at both
10 products, and an ordinary observer could see if there were
11 differences or they're confusingly similar, or if they are
12 physically present at a brick-and-mortar store, whether
13 they're packaged in a way where a person could actually
14 observe differences or not.

15 Not a criticism of Mr. Hatch. You know, that's not
16 what he was asked to do, but I'm raising that with the
17 parties. You can answer it at some point in the future.

18 Go ahead.

19 MR. BERKOWITZ: Sure.

20 BY MR. BERKOWITZ:

21 Q. Mr. Hatch, I see on the website of this slide that you
22 prepared below the principal purchaser, you've identified what
23 you say here is a low level of attention. Can you explain
24 what you mean by that?

25 A. Yes, and that sort of goes back to after understanding

1 that the purchaser might be someone who is quickly looking
2 through Amazon.com or walking through the shelves in Walmart,
3 that their attention is going to be drawn towards things like
4 the price point or how long does the battery last and things
5 that the -- the actual features on these pages and on the
6 boxes call out. And, therefore, they have a low level of
7 attention, not in life in general, but towards the styling
8 details.

9 Q. Okay. So we've covered first I believe the first two
10 steps of your methodology: construing the claims, defining the
11 ordinary observer. You said that the next step would be to
12 understand the prior art. So we have -- we have talked a
13 little bit about the prior art. Can you tell us what you
14 would do particularly in this case as applied to these patents
15 to understand the prior art?

16 A. Yes. And it's a very important part of the analysis to
17 understand the prior art.

18 What we see I think on the next slide here, we see
19 the six items, only six items of prior art, and these were
20 cited -- excuse me -- the six items that were cited on both
21 patents, on the '723 and '256, that had exactly the same prior
22 art. And we get an understanding then of the ordinary
23 observer, what they saw out in the world and how different
24 this new design was.

25 Now, if we go to the next slide, my understanding is

1 also that the '906 was invented at or around the same time, or
2 this was filed at or around the same time. And so even though
3 it wasn't -- the inventors did not include it or this hadn't
4 been made public at the time that the patents in issue were
5 filed, this is considered prior art in this case.

6 And so the '906 adds to our understanding of what
7 existed at that time.

8 Q. Okay. And can you characterize the '906 patent for us?

9 A. Yes. So we see from the '906 that it is also for a
10 similar-type vehicle, a self-balancing vehicle is our
11 understanding, and we see a very slick race move body.
12 Obviously we are seeing an hourglass shape which we saw in a
13 number of the other prior art as well. That itself was not
14 unique to the '906 when it was filed. Hourglasses have been
15 around for a while.

16 However, what we're seeing here is their
17 interpretation of that form in the way that it's so smooth and
18 so rounded, and I believe in my deposition I used the word
19 melted. It doesn't have those sort of hardened edges that we
20 see in some of the other prior art at the time.

21 Q. Okay. So we've now established the universe of prior art.
22 Can you tell us how that sort of plays into your analysis in
23 connection with these particular patents for each of the '256
24 and '723?

25 A. Yes. And I think maybe going back to the last side, I

1 think it's important to see that, you know, with our
2 understanding of what existed at the time, the '723 and '256
3 patents provided something that was really quite different,
4 quite radically different, and hadn't existed before it. So
5 in doing so, we see that the prior art is really quite far
6 away from the patents at issue, and, therefore, you would
7 understand that it has very broad scope.

8 Q. Okay. So we've now covered the first three steps of the
9 analysis. We've construed the claims, defined the ordinary
10 observer. We've gone through your understanding of the prior
11 art. What's the next step?

12 A. So the next step, if you go forward -- thank you.

13 THE COURT: Do you need some water?

14 THE WITNESS: Thank you.

15 THE COURT: Oh, you've got some. Okay.

16 BY THE WITNESS:

17 A. So in the next step, as I had mentioned before, first of
18 all, we do a direct comparison between the patent, the design
19 as a whole of the claimed part of the patent to the accused
20 product. And, again, of course my analysis was to the
21 physical product that I had at hand.

22 Here, as specifically, we're looking at a more sort
23 of broader look in this direct comparison to understand if are
24 they plainly dissimilar, are we looking at an apple and a
25 banana, or are we looking at similar products here.

1 The conclusion, as can be clearly seen, these are not
2 plainly dissimilar.

3 Q. And when you say "these," specifically what are you
4 referring to?

5 A. The -- yes, thank you. The accused product and the -- in
6 this case, the '723 design patent were not plainly dissimilar.

7 Q. So if you made the determination that the design claimed
8 in the '723 and the accused products, Gyroor A, are not
9 plainly dissimilar, what's the next step?

10 A. So when that has been confirmed, then we move on to the
11 next step of the analysis, the next step of the ordinary
12 observer test, which is where we now view this through the
13 eyes of the ordinary observer and we compare the patent, the
14 claimed design of the patent to the accused product and to see
15 whether they are closer to each other than they are to the
16 prior art.

17 Here on the slide we're seeing all three elements; in
18 this case, the '723 patent and the Gyroor A product, and the
19 prior art, including the '906 that was part of my analysis.

20 Q. And when you're performing this analysis, which views are
21 you focusing on as you compare -- do this three-way analysis?

22 A. It's very important to understand the design as a whole
23 because as we understand from this type of infringement
24 analysis and from *Egyptian Goddess*, the case that lays out
25 this process, we need to understand the design as a whole and

1 the impression that it makes, rather than take it apart into
2 individual isolated parts that you view through individual
3 viewpoints.

4 Q. Okay. I see here you have a particular perspective view,
5 for example, from Figure 6 of the '723 and comparing with
6 similar views. Is there a reason you chose that particular
7 view?

8 A. Well, the analysis was done looking at all the views of --
9 and of course the actual physical sample here, but for this
10 slide at least, this is a representative view showing an
11 angle. I think if I showed one of the more what's called
12 isometric angles like straight down or straight from the
13 front, that's not how people view products. It's very rare
14 that you would see it so directly. And so the ordinary
15 observer gets -- or us looking at this, we get a better
16 representation of the design at this angled view. But of
17 course the analysis was done with all views in mind.

18 Q. Okay. And could you walk us through how you would
19 apply -- how you would walk through that analysis with all
20 these different views?

21 A. Yes. Excuse me.

22 And so importantly here is to understand the design,
23 the impression of the design of the patent and then looking at
24 the accused product to understand the impression it's making.
25 In this case, we found, or I found that the impression that

1 they're making through the eyes of the ordinary observer would
2 be very much the same in light of the prior art. And so when
3 we're looking at the prior art, we get an understanding of how
4 far or how close that might be.

5 Q. Okay. So can you tell us a little bit more about how you
6 did that analysis, particularly with respect to the '906
7 patent?

8 A. Yes. So, for instance, with the '906 patent, maybe the
9 next slide may be -- thank you. So here we've got Figure 4
10 from the '906. Again, we're looking at it in all directions.
11 But we do see this very smooth, uncluttered, rounded body, and
12 there's no sort of pronounced areas around it. And I
13 understand, you know, I'm an industrial designer and not a
14 lawyer, but in my understanding, while it doesn't claim the
15 fenders as such in its own protection, when used in the
16 three-way analysis like this, we do consider them because it
17 has been disclaimed. It's something that was invented in the
18 past. And so we -- in looking at the '906 in this context, we
19 do see these closed fenders that cover the wheels, including
20 covering the hub.

21 Q. Okay. So --

22 THE COURT: You construe that, those dotted lines as
23 being fenders that cover the hub?

24 THE WITNESS: Yes. Yes, I would. It is not titled
25 as such in the patent, but knowing the context, that this is a

1 self-balancing vehicle or similar, I think it's fair to call
2 fenders. There may be other names that we can use, but what's
3 important here I think is the look that those give and the
4 impression. I wouldn't want to limit it to a particular word.

5 THE COURT: All right. But the upper oval you would
6 view as the fender, and the bottom half circle would be the
7 wheel?

8 THE WITNESS: Yes, that's my understanding.

9 THE COURT: Okay.

10 BY MR. BERKOWITZ:

11 Q. Now, you used the word "impression" several times. What
12 is that impression here when you're comparing these three
13 different products or references?

14 A. Yeah. So, again, obviously it's incorrect in this
15 analysis to translate everything directly into words and only
16 use the words as the claim. However, in this analysis, it's
17 kind of useful for me to explain how I think an ordinary
18 observer would be looking at this in light of the prior art.

19 So, for instance, the wording that I've included at
20 the bottom of this slide which is from my report describes how
21 the ordinary observer would see both the '723 patent and the
22 Gyroor A design when viewing them which I will briefly read
23 out here. They both create a visual impression of an
24 integrated hourglass body with a relatively flat surface
25 across the top of the main body, pronounced footing areas and

1 open-arched fenders over the top of the wheel area.

2 And so in a sense, it's a combination of those
3 features that we -- that give the overall impression and not
4 one of those features in isolation.

5 Q. Okay. And how did those features compare to those of the
6 '906 patent?

7 A. And so I do have a description for that which I'll cover
8 first and maybe explain a little bit further. But the
9 description here, again, describing how the ordinary observer
10 may see this, this creates an impression of very uncluttered,
11 rounded, smooth body with no pronounced footing area, and it
12 has closed fender skirts.

13 Maybe to clarify as well in using the term "fender
14 skirts" is from automotive and other areas where in the '50s
15 and '60s they used to hide the wheels, tucked away, that way
16 you'd just see the wheel popping out the bottom which is kind
17 of what we're seeing here.

18 But also important part of this analysis is not
19 individual features. For instance, the hourglass, we can't
20 help but see that there is an hourglass shape that all three
21 of these have. So we don't think the hourglass away, and I
22 believe it's incorrect to remove it from this type of analysis
23 because it's about the overall impression.

24 However, the hourglasses, the designs we see on the
25 left are more than just an hourglass representation. It's

1 also my opinion that the '906 at the time it was filed was
2 also protecting more than just an hourglass shape which has
3 existed for probably thousands of years.

4 Q. And so now that you've sort of explained what your
5 impression is of these different designs, what's the next step
6 in the infringement analysis?

7 A. And so here, having understood that overall impression and
8 seeing the different impression that we have, in this case the
9 Gyroor A and the '723 patent generally having -- giving the
10 same overall impression and understanding also that there are
11 differences. There are many intricate differences between the
12 two products. They are not identical. And that is important
13 to know. And that's why we look to prior art to understand
14 and have somewhat of a measuring stick to understand how close
15 they truly are.

16 My conclusion here, of course, that they look, when
17 referring to the prior art of the '906 here which has been
18 identified as the closest prior art, the Gyroor A and the '723
19 claimed design look very much the same, substantially the
20 same.

21 Q. And based on that, do you have an opinion with respect to
22 the issue of infringement with respect to the '723 and the
23 Gyroor A product?

24 A. Yes. And so that tells me that the Gyroor A infringes on
25 the '723 patent.

1 Q. Okay. And did you repeat that analysis for the second
2 patent, the '256 patent?

3 A. Yes, I did. And we can very briefly go through that. I
4 have some slides here, of course.

5 This is also comparing directly to the Gyroor A to
6 the claimed design of the '256 patent. Here in the first
7 step, again, looking to see if they are plainly dissimilar, I
8 concluded that they are not plainly dissimilar and therefore
9 moved on to the second step on the next slide, where I also
10 conducted the three-way analysis, comparing the patent and the
11 Gyroor A to each other in light of the prior art to understand
12 how close they are.

13 And on the next slide as well, we see there that, you
14 know, my concluding opinion coming from this is that the
15 Gyroor A and the claimed design of the '256 patent are
16 substantially the same in light of the '906 closest prior art
17 in the eyes of the ordinary observer.

18 Q. Okay. And did you then repeat this process for the other
19 accused products?

20 A. Yes, I did. And so after conducting this for the '723 and
21 Gyroor A, I also conducted the same for Gyroor C.

22 THE COURT: Can I interrupt? On Gyroor A, what -- I
23 know you're talking about overall impressions, but what
24 particular details do you believe are different or you found
25 to be different between the '256 patent and Gyroor A?

1 Understanding your opinion is the impression is they're the
2 same, but are there particular features of it that you would
3 acknowledge are different?

4 THE WITNESS: Yes, absolutely. There are
5 differences. And I think it's important to understand how
6 different those are, obviously in the three-way analysis
7 compared to the '906.

8 So, for instance, the fenders that we've spoken about
9 today, here we're looking at the '256 patent. We see the
10 fenders, cover, almost all of the very top of the wheel, and
11 the Gyroor A, for instance, cover a little bit less. The
12 wheel in this case of course is much wider so it's popping out
13 from the fender itself, but the fender is approximately the
14 same sort of proportions, but there are differences. It sort
15 of trims off a little sooner.

16 So certainly differences between the two, but to
17 understand how important those differences are, that's where
18 we go to prior art that existed prior to it, and there we're
19 seeing something entirely different. And so in this
20 particular case, we're seeing very minor differences that make
21 them not the same but very close to each other. And the '906
22 is clearly in a different ball park, if I can use that
23 expression.

24 THE COURT: What other small differences did you
25 observe between the '256 patent and the Gyroor A?

1 THE WITNESS: So I did obviously note that the
2 footing areas on both of them, they both have these pronounced
3 footing areas that the '906 doesn't have. And so within those
4 footings areas, we see the sort of angled grooves that they
5 both have, but those grooves are different shapes. So when we
6 zoom in to compare directly one to the other, we see, you
7 know, it's not the same shape. However, they both got those
8 pronounced footing areas in generally the same sort of shape.
9 And so glancing over to the '906 we see, again, it's not in
10 the same ball park.

11 There are some other differences. I would say the
12 shape of the lights, for instance. But these differences
13 contribute to the overall impression and shouldn't be ignored,
14 but the question is how significant are they to the overall
15 impression, particularly in light of the '906.

16 THE COURT: Okay.

17 BY MR. BERKOWITZ:

18 Q. Okay. So we've now covered the Gyroor A product with
19 respect to both of the asserted patents, so we were I think
20 about to move on to the Gyroor C product. Can you walk us
21 through your analysis with respect to Gyroor C?

22 A. Yes. I'll try and keep it brief in the interest of time,
23 but obviously step 1, I found they were not plainly
24 dissimilar.

25 In the second step of the ordinary observer test, I

1 found that the '723 patent and the Gyroor C were closer in
2 design than to the '906 prior art; and, therefore, the Gyroor
3 C infringes on the patent.

4 Q. Okay. And with respect to the '256 patent, did you also
5 do an analysis against the Gyroor C product?

6 A. That's correct. And so the same was applied independently
7 here, looking -- directly comparing Gyroor C to the
8 '256 patent which -- and they are not plainly dissimilar. And
9 so in the second step of the analysis on the next slide,
10 comparing the Gyroor C to the claimed design of the '256, I
11 found them to be closer to each other than to the prior art;
12 and, therefore, Gyroor C infringes on the '256 patent.

13 Q. In terms of the analysis, is there any notable differences
14 between the Gyroor A and Gyroor C?

15 A. There are; again, small differences, but those are very
16 minor in this regard. They -- Gyroor A and C are virtually
17 the same product.

18 I did note, again, some differences in the fender,
19 some small differences. But, again, in this analysis where
20 we're considering the size of differences based upon how far
21 away the prior art is, even those differences between the
22 Gyroor A and C do not have substantial impact on the overall
23 impression.

24 THE COURT: Well, it looks like Gyroor C, the fenders
25 cover the majority or all of the wheel, at least on the

1 example I have, compared to Gyroor A, which covers about half
2 the wheel.

3 THE WITNESS: Yes, that's correct. And so the Gyroor
4 C fender goes down a little bit further, and the wheel is
5 different too. I think Gyroor A has a much thicker wheel and
6 it would take a much bigger fender to cover it. So it's --
7 these are proportions that we take into respect, but, again,
8 it's -- it doesn't seem a significant difference between
9 Gyroor A and C.

10 THE COURT: It looks like the foot paddings, the
11 design of the foot paddings on A and C are the same. They're
12 different in E. But you'll get to that.

13 THE WITNESS: Yes.

14 THE COURT: But the design looks the same of the two
15 products anyway.

16 THE WITNESS: Yes. And in -- at least in this
17 infringement analysis, I wasn't doing a direct comparison
18 between, say, A, C, and E. However, obviously in
19 understanding their design and comparing it to the patent, I
20 found they played exactly the same role.

21 BY MR. BERKOWITZ:

22 Q. Okay. So we've now covered the accused product Gyroor A,
23 Gyroor C. Did you repeat this analysis for the final product,
24 the Gyroor E?

25 A. Yes, I did, so we can briefly go through that as well,

1 where I compared in the first step Gyroor E to the '723 patent
2 and found they are not plainly dissimilar, and then comparing
3 to the prior art to understand how much effects the
4 differences have between the two products. I also found that
5 Gyroor E and the '723 are much closer together, not identical,
6 but much closer together than the prior art.

7 Q. To the judge's question, are there any notable differences
8 between the A, C, and now looking at E?

9 A. Yes. And, again, in the fender area, we see that it has a
10 somewhat shorter fender than Gyroor B, for instance. It may
11 be a little closer to A if we were looking at that part in
12 isolation. We see some differences around the lighting area
13 and the grooves are generally the same sort of feel; but when
14 we compare, we do see differences.

15 Q. Okay. As far as your infringement analysis, what is the
16 impact of those differences?

17 A. Because of how far away the '906 is, the impacts of those
18 is relatively insignificant on the overall impression. They
19 do -- they are part of the overall impression, and if we were
20 comparing only A, B, and E together, we would then be seeing a
21 narrowing down on those slight differences as being very
22 important. However, of course, when comparing directly to the
23 '906, we see how insignificant small differences are in
24 particular between the accused products and the patent.

25 Q. Okay. I just want to -- so with respect to the Gyroor E

1 product, are there differences with respect to these footpads
2 as compared to the A and the C?

3 A. Yes, there are. Beyond obviously the color or material
4 differences, I believe there's one or two grooves less, but it
5 has the same what we would call a fleur-de-lis type
6 impression. It's the angled length. So very similar, and,
7 again, that would just be analyzing those particular
8 differences on that particular part.

9 Q. Okay. And did that -- did these differences have any
10 impact on your determination as to infringement or
11 non-infringement?

12 A. Well, I guess I wasn't looking directly at differences
13 between the products. It was always, as I understand it
14 should be, to the patent itself. And so yes, of course I
15 understood and saw those differences. I do not believe that
16 an ordinary observer would -- would not see those differences
17 if faced with one design next to the other. However, it
18 doesn't have an impact on the overall impression when
19 comparing these designs.

20 Q. Okay. And just to close the loop on the '723 patent as
21 compared to the Gyroor E, what is your opinion with respect to
22 the issue of infringement?

23 A. That Gyroor E infringes on the '723 patent.

24 Q. Okay. And moving on to the '256 patent, could you just
25 quickly walk us through your infringement analysis?

Hatch - cross by Cheng

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1 A. Yes. I also found that Gyroor A was not plainly
2 dissimilar from the '256 patent; therefore conducted the next
3 step where I also concluded after the analysis that the
4 Gyroor E is closer to the '256 patent than the closest prior
5 art, and, therefore, that it infringes on the '256 patent.

6 Q. Okay.

7 MR. BERKOWITZ: So we don't have any more questions
8 for Mr. Hatch.

9 THE COURT: All right.

10 Cross-examination.

11 MR. CHENG: Shall we start?

12 THE COURT: Yes, you may proceed.

13 CROSS-EXAMINATION

14 BY MR. CHENG:

15 Q. Hi, Mr. Hatch. As instructed -- hi. As instructed by the
16 Federal Circuit, we should look through the infringement issue
17 through the lens of prior art.

18 THE COURT: You're a little soft spoken.

19 MR. CHENG: Right.

20 THE COURT: So move the mic a little closer or raise
21 your voice.

22 MR. CHENG: Yes, sorry.

23 BY MR. CHENG:

24 Q. As instructed by the Federal Circuit, we have to look at
25 the infringement issue through the lens of the prior art. Do

1 you agree that the '906 patent is a prior art in this case to
2 the patents-in-suit here?

3 A. I don't know all the legal structure, but my understanding
4 is that it should, as far as my analysis is concerned, be
5 considered prior art.

6 Q. Okay. And do you agree that the comparison between the
7 D '906 patent and the two patents-in-suit is necessary to
8 determine the infringement issues here?

9 A. As part of the analysis, as I showed, it plays a role when
10 we do the three-way analysis to understand which is closer and
11 which is further apart.

12 Q. So let me ask you, when you compare the D '906 patent with
13 the two patents-in-suit, what are the similarities between the
14 D '906 patent and the two patents-in-suit?

15 MR. CHENG: And, Peter, if you can bring the '906
16 patent with the '723 patent side by side so --

17 MR. PHANEUF: '906 and '723?

18 MR. CHENG: Yes. Just do the overlay so it will be
19 easier for us to understand.

20 THE COURT: Here we go.

21 MR. CHENG: Great.

22 BY MR. CHENG:

23 Q. So, Mr. Hatch, was the hourglass body shape disclosed in
24 the '906 patent?

25 A. The '906 includes an hourglass body, a version of it that

1 is, but that's not all it includes.

2 Q. Right. And was a flat surface on top of the hoverboard
3 also disclosed in the '906 patent?

4 A. It appears to feature a generally flat upper surface as
5 part of its claimed design.

6 Q. Yeah. So I'm going to read a part of the plaintiffs'
7 motion, and that is page -- that is on page 12 of
8 Docket No. 593. It says, "None of the relevant prior art
9 creates the same visual impression of the patent-in-suit,
10 namely the integrated hourglass body with a relatively flat
11 surface across the top of the main body."

12 So as you just admitted, '906 have disclosed the
13 hourglass shape with a flat surface, does that change your
14 opinion knowing that --

15 A. Could you read the rest of the sentence? I think you cut
16 it off.

17 Q. Okay.

18 THE COURT: This is from a brief, not from his
19 report?

20 MR. CHENG: That is from the motion brief, yes.

21 THE COURT: Okay. Well, go ahead, but that's of what
22 limited utility. That's what the lawyer said. His own
23 affidavit is, of course, fair game for cross.

24 MR. CHENG: Oh, that portion was quoted from his --

25 THE COURT: It's quoted from his --

Hatch - cross by Cheng

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1 MR. CHENG: From his report.

2 THE COURT: Okay. Fair enough. Go ahead.

3 BY MR. CHENG:

4 Q. So, "Namely, the integrated hourglass body with a
5 relatively flat surface across the top of the main body,
6 pronounced footing area, and open-arched fenders over the top
7 of the wheel area."

8 A. So you understand why I wanted the rest of the sentence
9 read out.

10 Q. Mm-hmm.

11 A. Because taken out of context it could mean something quite
12 different.

13 Q. But you do agree that both the flat surface and the
14 hourglass body shape were disclosed in the '906 patent?

15 A. The '906 patent which shows obviously a very different
16 design does include those particular attributes. However,
17 that sentence in full is making a different statement.

18 MR. CHENG: Peter, can we do the overlay of the top
19 view of '906 and the '723?

20 BY MR. CHENG:

21 Q. By comparison, the hourglass peripheral shape looks very
22 identical between the '906 patent and the '723 patent. Do you
23 agree?

24 A. Obviously you're just showing this one particular view.

25 There are --

1 Q. That's one of the views I'm showing, yes.

2 A. Yes. There are differences, and there's a lot of
3 similarities.

4 Q. Can you --

5 A. Conceptually speaking, they both have an hourglass as does
6 the accused product, which I think is important in this
7 comparison. But we don't rule out the hourglass. We have
8 different interpretations of something that's an hourglass
9 form.

10 Q. So you are saying even if the hourglass shape was
11 disclosed in the '906 patent it should still be factored into
12 infringement analysis?

13 A. It should not -- my understanding of the procedure in the
14 three-way comparison is that we don't factor out or remove
15 specific elements. We need to consider them as part of the
16 overall impression. And important in this particular case
17 that has been raised is the question of the hourglass shape.
18 On the '906 as well as the '723, the hourglass shape was not
19 the reason either of them were awarded a patent. It was not
20 novel at the time. What was novel was the overall impression
21 that the '906 has provided as shown in the figures.

22 Q. Right. But you do know that your previous report was
23 criticized by the Federal Circuit for lack of specific
24 comparison because if we're using the overall impression
25 without getting into details, then there's virtually no

1 analysis. You are just using the phrase to cover the
2 comparison or the detailed analysis that's supposed to be done
3 here.

4 So what I'm showing you here is should the hourglass
5 shape be -- if it's disclosed in the '906 patent, why should
6 that be considered for the infringement analysis since every
7 hoverboard basically on the market followed the '906 patent in
8 that they all have similar hourglass shape?

9 A. And your question is whether it should be considered?

10 Q. Why it should -- why shouldn't -- yes, why it should be
11 considered if it's disclosed in your prior art already?

12 A. Chiefly because *Egyptian Goddess* tells us what the
13 infringement analysis should include, and my understanding of
14 the three-way analysis is that we do look to the overall
15 impression through the eyes of the ordinary observer. I'm not
16 using that as a blanket, you know, in the way that you are
17 putting forward. The overall impression is created by looking
18 at individual features of the overall design. But it is a sum
19 of those features. So we don't extract the hourglass and then
20 say, oh, the hourglass existed already, we ignore it. That's
21 my understanding of the law is it still is an important part
22 of the overall impression.

23 Q. I'm glad that you mentioned different features, and I
24 think we are just trying to identify which features were
25 disclosed on and which feature were new to the products. So

1 in that way, I think we'll have a better understanding when
2 the ordinary observer looks at the products how the
3 impression, the overall impression was formed by different
4 features, right. If two products have similar features, then,
5 I mean, it's hard to tell the difference, and that's exactly
6 why we have to look through the lens of prior art. Was the
7 fender also disclosed in the '906 patent in your opinion?

8 A. The '906 patent has -- shows an unclaimed fender so it
9 does not protect a design of a fender.

10 Q. That's not what I asked. I asked was the fender disclosed
11 in the '906 patent?

12 A. I'm sorry. I misunderstood.

13 So when it comes to infringement analysis, in a
14 three-way analysis as we conducted, yes, we consider it to be
15 disclosed.

16 Q. And when you were talking about the footing area to the
17 '723 patent, does the claim protect the idea of the footing
18 area on the hoverboard, or does the claim protect the design
19 of that footing area?

20 A. The claim of the '723 is to the ornamental design of the
21 pronounced footing area, that is, you know, just using words,
22 that we have a footing area that is somewhat pronounced in
23 that area.

24 Q. So when you say "pronounced," are you talking about
25 because the '723 patent has the footing area as pronounced, or

1 because you had the design that is different from the '906
2 patent so it's pronounced?

3 A. No, we're not talking about conceptually whether it has,
4 you know, an item or not. Pronounced is offering an
5 attribute, you know, that it's not just a footing area but
6 this has been pronounced in some way, that that is a decision
7 that has been made by the designer as opposed to, say, on the
8 '906, there was a decision to not pronounce what might be a
9 footing area.

10 Q. When you say might be footing area, do you agree that '906
11 patent has a flat top surface?

12 A. I believe you asked that before, but yes, it's a generally
13 flattop surface, but it is -- it may or may not be a footing
14 area.

15 Q. So if we compare the '906 patent to the '723 patent, just
16 a top view, the defense is the '723 has the footing area, but
17 the idea of having this footing area is not protected, but the
18 design of the straight lines on the footing area is what's
19 protected by the claim?

20 A. Which straight lines are you referring to that are
21 protected by the claim?

22 MR. CHENG: Can we take a look at the '723 patent?
23 Here it is.

24 BY MR. CHENG:

25 Q. Yes.

Hatch - cross by Cheng

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1 A. Mm-hmm.

2 Q. So what's being protected, as you just admitted, is not
3 the idea that it has a foot padding but the actual design of
4 this foot padding?

5 A. Yes, the solid lines show what is claimed. However, to
6 understand infringement, then we look to the prior art to
7 understand how much scope elements like that have.

8 Q. Meaning that the prior art doesn't have any design on the
9 top, so here what's being protected is really just, you know,
10 the straight line of this design; is that correct?

11 A. What do you mean by the straight line of the design?

12 Q. The straight line as --

13 A. Are you referring to the ribbed detail?

14 Q. Yes. I'm talking about the lines on top of the padding.

15 A. Okay. Yes.

16 MR. CHENG: Can I just use one of these?

17 BY MR. CHENG:

18 Q. Can you tell that the lines --

19 THE COURT: You need to be in front of a microphone.

20 MR. CHENG: Oh.

21 THE COURT: Just make sure that you're there.

22 BY MR. CHENG:

23 Q. But can you tell -- can you see the lines here on this
24 foot padding, those are not straight lines? They're bended in
25 two different directions?

1 A. Yes, they are -- those ribs, and I am familiar with it.

2 They have angles, yes.

3 Q. And this is one of the features that you mentioned that is
4 different from the patent; is that correct?

5 A. Which patent are you referring to?

6 Q. '723. Let us just use '723 as a patent so it will be
7 easier to avoid any confusion.

8 So the lines here, they are bended lines, and they
9 are different from the straight lines on that '723 patent. Do
10 you agree?

11 A. Yes. When we are looking at this, comparing those exact
12 details, there are differences, as I have pointed out and
13 acknowledged, but of course that's not the analysis here.

14 Q. Right. We are just trying -- I'm just trying to
15 understand the different elements as you put the different
16 designs into elements. So this element is different. Is this
17 element noticeable to an ordinary observer in your opinion?

18 A. In the three-way analysis, we understand -- we use that as
19 a structure to understand what would be noticeable in your
20 words.

21 Q. Uh-huh.

22 A. And of course in the overall look and feel, it doesn't
23 have a significant effect on the overall impression. For
24 instance, if those lines were slightly different, it would not
25 have a significant difference on the overall impression --

Hatch - cross by Cheng

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1 Q. Yeah.

2 A. -- and make it suddenly closer to the '906.

3 Q. Well, I wouldn't call this slightly different. I mean,
4 the lines are drastically different as they are bended, it's
5 not straight, and that they are going two different
6 directions, and the bended, you know, direction is not towards
7 the wheel but towards the metal. So do you think this is
8 noticeable to an ordinary observer?

9 A. When looking at the product as a whole, the ordinary
10 observer would see those differences.

11 Q. Okay.

12 A. But it does not change the overall impression.

13 Q. And what about the fender --

14 MR. CHENG: If you can just show the '906 -- the '906
15 side -- front view versus the '723 front view.

16 BY MR. CHENG:

17 Q. So as we can see here as you acknowledged, the fender was
18 disclosed in the '906 patent. And the fender in the '723
19 covers the whole wheel, right? Take a look from --

20 THE COURT: Let me interrupt. It was disclosed but
21 not claimed in the '906 patent.

22 THE WITNESS: Yes, that's my understanding,
23 Your Honor.

24 THE COURT: What is the difference between something
25 that's been disclosed and claimed? You can answer.

1 THE WITNESS: As a nonlawyer, my understanding in
2 this analysis is it -- the patent shows the unclaimed matter.
3 It is not offered protection of that design. However, when
4 we're looking back at it as prior art in this analysis, we
5 understand that the inventor had that shape in mind, and it
6 was disclosed to the public. So, therefore, that design,
7 there is already public knowledge of that design even though
8 that patent does not offer protection for that inventor.

9 THE COURT: And how does that impact your analysis
10 of -- as it relates to the comparison between the --

11 THE WITNESS: Yeah.

12 THE COURT: -- allegedly infringing products and the
13 two patents?

14 THE WITNESS: And so here what the 9 -- the
15 protection of the '906 is almost irrelevant for me because the
16 '906 is used as prior art, and, therefore, my analysis
17 included the fenders, the closed fenders, that that design has
18 as part of the consideration.

19 THE COURT: Okay.

20 You can continue your questions.

21 MR. CHENG: Yes.

22 THE COURT: How much more do you have? Because we're
23 at 12:30. If you got a ways to go, we'll break.

24 MR. CHENG: I have three-quarters --

25 THE COURT: All right.

Hatch - cross by Cheng

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1 MR. CHENG: -- left. We can take a break if

2 Your Honor --

3 THE COURT: Why don't we take a -- and you're local;
4 is that correct?

5 THE WITNESS: Yes.

6 THE COURT: You're not going to miss a flight if we
7 break for lunch. So let's break for lunch. You can continue
8 your cross-examination.

9 The witness is on cross-examination so you can't
10 discuss his testimony with him during the break.

11 We'll break for an hour. Come back at 1:30.

12 Thank you.

13 MR. LOMUSCIO: Thank you, Your Honor.

14 (Lunch recess had from 12:31 p.m. to 1:30 p.m.)
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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2			
3	HANGZHOU CHIC INTELLIGENT)	
	TECHNOLOGY CO., and UNICORN)	
4	GLOBAL, INC.,)	Case No. 20 CV 4806
)	
5	Plaintiffs,)	Chicago, Illinois
	-vs-)	December 2, 2022
6)	1:31 p.m.
	THE PARTNERSHIPS AND)	
7	UNINCORPORATED ASSOCIATIONS)	
	IDENTIFIED ON SCHEDULE "A,")	
8)	
	Defendants.)	

TRANSCRIPT OF PROCEEDINGS - PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE THOMAS M. DURKIN

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Hatch - cross by Cheng

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1 (Proceedings heard in open court:)

2 THE COURT: Just need defense counsel, and then we'll
3 get going.

4 MR. CHENG: Your Honor, we just --

5 THE COURT: We'll go off the record. Is this
6 scheduling?

7 MR. CHENG: Yes.

8 (Discussion held off the record.)

9 THE COURT: Back on the record.

10 Sir, you're still under oath.

11 THE WITNESS: Yes.

12 MR. CHENG: Peter, if you can just put on the slide,
13 the side edge of the product. I think I was --

14 THE COURT: Kathy, when he's speaking to his
15 colleague, you don't have to transcribe it.

16 PAUL HATCH, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN,
17 CROSS-EXAMINATION (RESUMED)

18 BY MR. CHENG:

19 Q. Mr. Hatch, we were talking about the fenders which is one
20 of the main feature mentioned in the Federal Circuit opinion.

21 Do you think -- you can see from the front view and
22 also in the screen in front of you, do you think the fender,
23 the shape of the fender, the structure, the concept of design,
24 are those all different from -- from the two patents
25 significantly or noticeable to an ordinary observer?

1 A. To clarify, you said the shape and the concept of the
2 fender?

3 Q. Well, let's do that one by one. Do you think the shape is
4 different?

5 A. There are differences that we can notice of the fender in
6 particular, yes.

7 Q. And do you think you can elaborate the differences between
8 this fender here and the two patents? Let's just stick with
9 one. '723, can you tell -- ask what the differences are?

10 A. Yes. If we -- if we are focusing solely on the fender, we
11 do see differences. The difference is that the accused
12 product that you're holding up, that's Gyroor A, has a fender
13 that goes over the wheel but then cuts back a little bit
14 sooner as it comes down to the platform, but it kind of joins
15 the platform.

16 The wheels on it, of course, are wider, so that sort
17 of has an effect on how we're seeing the fender as well. But,
18 yes, it -- it goes over the top of the wheel, but then it cuts
19 back as it goes towards the platform.

20 Q. Does the fender cover the wheel?

21 A. It covers at least some of the wheel.

22 Q. From this side, does the fender cover the wheel from the
23 side view?

24 A. In all views, it covers only side of the -- I mean, we can
25 see it's above the wheel still. It's still covering some of

1 the wheel. It doesn't change if you turn it around.

2 Q. Yeah, can you see the whole wheel from this side?

3 A. I can see -- I can see the whole wheel.

4 Q. As you mentioned, there are so many features in the
5 hoverboard design. Do you give equal weight to every design
6 element?

7 THE COURT: You're going to have to stay in front of
8 the microphone.

9 BY MR. CHENG:

10 Q. As you said, there are so many features in a hoverboard
11 design. Do you give equal weight to every design feature?

12 A. Viewing it through the eyes of the ordinary observer, all
13 the features are -- do contribute to the overall impression,
14 so they do not get taken away, but they do have different
15 effects on that impression.

16 Q. So you value some features more than the others?

17 A. Some features have a bigger contribution to the
18 impression. It's not, you know, how I view it, it's through
19 the eyes of the ordinary observer.

20 Q. And as the Federal Circuit mentioned, since the hourglass
21 was disclosed in the prior art, it becomes a minor feature and
22 it's kind of retreated to the background.

23 Do you agree with Federal Circuit's analysis here?

24 A. I don't disagree with Federal Circuit's analysis, although
25 you seem to have interpreted it quite differently.

1 Q. Oh, how would you interpret the Federal Circuit's decision
2 on this issue?

3 A. Well, my understanding of what we need to do here is to
4 include the hourglass shape as part of what's giving us the
5 overall impression. I agree with the Federal Circuit that the
6 hourglass shape is not something that was novel to any of
7 these, including the '906 before that existed, and so these
8 patents don't rely solely on that.

9 Q. And as you can see in front of you the comparison, can you
10 tell us what feature brought you to make the conclusion that
11 the accused products is not substantially dissimilar to
12 the '723 patent?

13 A. Are you referring to the first stage of the analysis where
14 we are not comparing to prior art?

15 Q. That was a double negative. Let me rephrase it.

16 What features made you conclude that the accused
17 product is substantially similar to the D '723 patent?

18 A. All of the features are included because they all,
19 including the hourglass shape, they all contribute to the
20 overall impression. So, you know, I'm not ruling out features
21 because of that.

22 Q. Oh, I'm not asking to be ruling out features, but you just
23 admitted that the fender looked different, the design of the
24 foot padding looked different, and the hourglass, as the
25 Federal Circuit is a minor feature, even we don't, you know,

1 exclude that feature, but since that was disclosed in the
2 prior art, it becomes a minor feature.

3 So, and as you said, all features put together form
4 this overall impression. But that's conclusive. That's same
5 as saying their detailed analysis is not required, as long as
6 I use the word overall impression. The overall --

7 THE COURT: I think you're giving a closing argument.

8 MR. CHENG: Sorry, your Honor.

9 THE COURT: Simply ask questions.

10 BY MR. CHENG:

11 Q. So the overall impressions viewed on the features, do you
12 agree with that?

13 A. It includes viewing the features, all of the features that
14 we see here, absolutely.

15 Q. And I noticed on your analysis you didn't do a comparison
16 of the bottom view.

17 Is that why that was not included in your analysis or
18 in your report to support the preliminary injunction motion?

19 A. No, I included all of the product as a whole, and the
20 bottom was certainly part of that analysis.

21 Q. I'm looking at the report that you provided, document
22 number 594, and I don't see any reference to the bottom view.

23 A. You'll find I did the full, all of the views in -- the
24 applicable views of the patents in Exhibit 1 that was
25 attached.

1 Q. No, no. Exhibit 1 is your CV, I think.

2 A. I'm sorry, Appendix 1. It's where the three-way
3 comparisons are.

4 Q. The Appendix 1 is your CV.

5 A. Oh, then it's Exhibit 1.

6 Q. I don't see any exhibit attached to this report.

7 A. There is a full -- there should be an attachment, which
8 has been referred to in the past, you brought it up in
9 deposition, that includes all of the three-way analyses.

10 MR. CHENG: Peter, do you mind putting on the bottom
11 view comparison?

12 THE COURT: Well, show him his expert report. You're
13 saying there's something missing from his expert report. Just
14 show it to him, and he can identify it or disagree with you.

15 MR. CHENG: Oh, I'm doing it now. It's not in the
16 expert witness report, so I don't know -- I don't want to
17 reference to any other documents.

18 THE COURT: Do you have the report up there with you?

19 THE WITNESS: I don't, but I believe counsel --

20 THE COURT: Any objection to him having the report up
21 there?

22 MR. CHENG: Well, they can bring up the report.

23 THE COURT: Yeah, if you've got one without notes,
24 you can give it to him.

25 What I can see is Exhibit 1 is a three-way comparison

1 between the accused products and the patents-in-suit. There
2 is a CV attached as Appendix A, and then there's the
3 affidavit, the declaration.

4 BY MR. CHENG:

5 Q. Anyway, we're going to put the bottom view on the screen
6 so we can look at the pictures unless you don't think they
7 clearly represent the bottom view of the products.

8 So I think it shows the top view, the front view, and
9 the bottom view of the accused product, the prior art, and
10 the -- one of the accused patent.

11 Can we just stick with '723 for all cases? I think
12 that's the next page.

13 Oh, never mind. That works.

14 If we're only focused on the bottom view, there are
15 three pictures at the bottom line of this slide?

16 A. Only the bottom three, ignoring the rest.

17 Q. So you can see that there's a bottom view of the accused
18 product, a bottom view of the prior art, and a bottom view of
19 one of the patents-in-suit.

20 In your opinion, are they look substantially similar
21 to each other?

22 A. The opinion that I gave was through the eyes of an
23 ordinary observer --

24 Q. Uh-huh.

25 A. -- and, importantly, it was of the product as a whole, and

1 as I explained, they are substantially similar. If we were
2 incorrectly to focus only on one view at a time, yes, we
3 notice differences.

4 Q. So do you see the ribs in the middle of the accused
5 product?

6 A. Yes, I see it on the product and also in this view, yes.

7 Q. And are you aware there is a built-in speaker to this
8 product?

9 A. Say that again?

10 Q. Are you aware there are built-in speaker in this
11 hoverboard product?

12 A. I --

13 Q. Speaker.

14 A. I heard speaker. The word before that?

15 THE COURT: Built-in.

16 BY THE WITNESS:

17 A. Built-in, sorry.

18 BY MR. CHENG:

19 Q. Yes.

20 A. Yes, I'm aware. But, of course, that's not part of
21 looking at the patent analysis here.

22 Q. Can you see the holes on the bottom of this product?

23 A. I see the fine holes, yes, the perforation, yes.

24 Q. And this speaker ventilation hole present in the prior
25 art, in the accused -- in the one of the patents-in-suit, the

1 D '723 patent?

2 A. No, it doesn't have holes in that location.

3 Q. Do you think this is a noticeable difference?

4 A. In the overall impression, it does not have a significant
5 effect. If it were there or not, the patent would still
6 infringe. Sorry, the accused product would still infringe of
7 the patent.

8 Q. Yes. Let's also compare the pads here, and the pads has
9 been isolated in the picture showing on the screen.

10 Can you see that the shape and the lines and the
11 designs, do you think they are substantially similar?

12 A. Well, what's shown is not the patent, for one thing.

13 Q. It's one feature, yes, I agree with you.

14 A. No, still it's an interpretation of the patent that's gone
15 a certain direction. You've made some certain calls to change
16 it in a certain way.

17 My analysis was not -- it was based upon the patent
18 and what the patent covers, and the analysis would be
19 incorrect to compare it to an interpretation of that patent.

20 Q. Uh-huh.

21 A. And also the prior art is missing in this picture.

22 Q. So I think what confuses me is if all the features are
23 different as acknowledged by you and the hourglass shape and
24 the flat surface are minor features decided by the Federal
25 Circuit, then how can the overall impression viewed on those

Hatch - cross by Cheng

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1 features substantially different -- substantially similar?

2 MR. BERKOWITZ: I'm just going to note my objection.
3 This mischaracterizes his testimony.

4 THE COURT: The witness can correct it if he thinks
5 he mischaracterizes it.

6 BY THE WITNESS:

7 A. Yes, there were a number of things there, but I certainly
8 didn't say that all of the features are substantially
9 different, and I -- sorry, can you unpack that question,
10 rephrase it?

11 BY MR. CHENG:

12 Q. Sure, I guess that question has two parts.

13 First is that the Federal Circuit noticed that the
14 hourglass shape and the flat surface were disclosed in the
15 prior art, so they become minor features. And then all the
16 other features you also acknowledged they are different from
17 the accused products. Then how can the overall impression
18 viewed on those features substantially similar?

19 A. Because when -- again, you packed a number of somewhat
20 untruths in there. The Federal Circuit did not say that it
21 was minor, is my understanding, but they did point out that --
22 sorry, I'll move forward to your question.

23 The overall impression is still substantially similar
24 especially when we look to the prior art because we combine
25 all of those details as you're referring to of the designs

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1 together to gain the overall impression, and when we look at
2 the '906, it's devoid of such details, like the perforations
3 that you're pointing out very nicely right now. The '906
4 doesn't have them.

5 So it's important that we use the '906 as the basis
6 for the comparison within infringement analysis.

7 MR. CHENG: Can I have the two patents-in-suit side
8 by side, the '723 and the '256.

9 BY MR. CHENG:

10 Q. Mr. Hatch, you just mentioned previously during the direct
11 examination that you were saying those two patents are very
12 similar to each other.

13 A. They were filed at the same time, and they have many
14 similarities, yes.

15 Q. And somehow separate patents were granted to both of them?

16 A. Yes. One doesn't act as prior art to the other. They
17 came from the same inventor.

18 Q. So do you think the examiner acknowledged there are
19 sufficient differences between those two patents, so separate
20 patents were granted to both of them?

21 A. Yes.

22 Q. So --

23 A. Other --

24 Q. Sorry. I'll let you finish.

25 A. But, of course, they acknowledge that one can't be prior

1 art to the other because it's from the same inventor. So I
2 understand that would be different if they were looking at two
3 patents from two different inventors.

4 Q. So if the minor difference between those two is sufficient
5 to support the issuance of two separate patents, do you think
6 the differences between this accused product is
7 substantially -- is substantial and noticeable to an ordinary
8 observer to the two patents-in-suit?

9 A. My understanding that's not a legal comparison, but the
10 comparison, of course, for infringement is between the accused
11 product in light of the prior art.

12 These were also examined in light of the prior art
13 and found to be substantially dissimilar, so the comparison
14 goes back to the prior art. We should not ignore that when
15 conducting infringement analysis.

16 Q. Just a few more questions.

17 A. They are quite heavy.

18 Q. Just a few more questions.

19 One of your prior report, and in your previous report
20 and, you know, one example of them in Document 388 that you
21 included four products, A, B, C, D, against the -- against
22 four patents-in-suit, and obviously product B and product D
23 were dropped from your most recent report.

24 Has your mind changed considering the infringement
25 nature that you previously included against product B and

1 product D?

2 A. No, it has not.

3 Q. And can you tell us why they were not included in your
4 most recent report?

5 A. Because in this preliminary -- in this particular
6 preliminary injunction, the focus is on A, C and E, and that
7 does not include B and D, which I have included in other
8 reports.

9 Q. Uh-huh. And a little bit more on the legal standard that
10 you proposed regarding the ordinary observer, that you
11 mentioned that that has to be a real life purchaser with
12 little or no experience purchasing hoverboards.

13 Do you think that is consistent with the legal
14 standard purported by Federal Circuit?

15 A. I don't see a fault with my understanding that the
16 purchaser in this particular case would be as I described in
17 the report. I'm not sure where you're pointing out there's a
18 gap.

19 Q. Because this hypothetical ordinary observer supposed to be
20 conversant with all the prior arts. Do you disagree with
21 that?

22 A. That is correct. As I showed in my diagram, we understand
23 who the purchaser is to understand the level of acuity that a
24 hypothetical ordinary observer would apply to their knowledge
25 of the prior art.

1 Q. If that purchaser has little or no experience purchasing
2 hoverboards, how can you expect that purchaser to be
3 conversant with all the prior arts?

4 A. The purchaser is not conversant, sorry, conversant with
5 the entire prior art. The purchaser is not looked at for
6 their knowledge of prior art, but they are looked at for the
7 acuity that they pay towards that in order to form the
8 construct of a hypothetical ordinary observer.

9 You were referring only to the purchaser there.

10 Q. So you disagree with the legal standard that the
11 hypothetical purchaser should be conversant with the prior
12 art?

13 A. The hypothetical ordinary observer in this test is the
14 construct we use to represent someone who is conversant with
15 the entire relevant prior art, whereas we only look at the
16 purchaser as an example to understand the level of acuity.

17 Q. I still don't get it. Are you mixing a real live
18 purchaser with this hypothetical ordinary observer?

19 A. No. I understand the confusion. It's quite common, but
20 the purchaser we only look at to understand, okay, how
21 quickly, do they give a fleeting glance to these products, or
22 do they really tear it apart and understand things? I've
23 worked in both areas, and I understand there's a big
24 difference. You don't want to hear my tales about that.

25 But the hypothetical ordinary observer is not a real

1 person. It is a hypothetical person that's used as a
2 construct in this type of analysis. The only thing that we
3 take from the purchaser is their level of acuity. That is my
4 understanding. So I'm not confusing the two.

5 Q. Well, my understanding -- but you do agree an ordinary
6 observer with little or no experience purchasing a hoverboard
7 cannot be conversant with all the prior arts?

8 A. No. You are mixing the two. So the hypothetical ordinary
9 observer has knowledge of the prior art. That is the
10 construct that we use here.

11 And the purchaser we base on real life to understand
12 how that person goes about purchasing and what level of
13 attention do they pay in that situation.

14 Q. And you're saying a low level of attention is sufficient
15 to support this ordinary observer's knowledge of all prior
16 arts?

17 A. Again, you're mixing the two things there. The knowledge
18 of prior art is the ordinary observer, which is a hypothetical
19 person.

20 You could bring up my diagram if you want. I've gone
21 to lengths to explain this.

22 Q. I've seen the diagram and that's what confused me, but
23 thank you for your explanation.

24 Do you understand the differences between the outline
25 of a drawing and the shading of a drawing?

Hatch - cross by Cheng

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1 A. As a designer, yes, I do.

2 Q. Okay. I'm just going to -- this is Figure 3 of the '906
3 patent. I just got it printed, so it looks bigger.

4 Does that represent a curved bottom, the drawing?

5 A. It is somewhat curved, yes. We understand that by looking
6 at all the views.

7 Q. And to look at this, this is Figure 1 of the '906 patent.
8 Do you agree this represent a flat surface from the shading of
9 the drawing?

10 A. When you're pointing, you're referring to the whole body?

11 Q. No. I mean this is the outline, right, and there are
12 lines in the middle --

13 A. Ah, right.

14 Q. -- that the shading of the drawing represent a flat
15 surface for this particular design?

16 A. The shading on the edges there represents that it curves
17 on that top surface, so the top surface is not entirely flat.

18 Q. You're saying the top surface is not entirely flat?

19 A. Point to the shading that you're referring to. Around the
20 edges, right?

21 Q. No, like this is a shading. See this straight line?

22 A. Yes.

23 Q. This is shading.

24 A. Yes.

25 Q. This is also a shading. Does that represent a flat

1 surface of this drawing?

2 A. It -- the shading does show that there is a surface there,
3 and we know based on the other views that it is a somewhat
4 flat surface. There is and can be curvature there.

5 Q. Sorry, can you repeat the last part? I didn't --

6 A. It's a somewhat flat surface.

7 Q. Okay.

8 A. And, you know, we see shading being used here to designate
9 curvature, where it's certainly not flat, such as at the very
10 top of that image.

11 You were talking about the shading, right?

12 Q. I'm talking about shading, like this part.

13 A. Those particular lines, right.

14 Q. Are you saying this is flat or this is curved?

15 A. In looking at all the views, we know that it is, say,
16 substantially flat --

17 Q. Okay.

18 A. -- but not entirely flat. It's partially flat with
19 rounded edges.

20 MR. CHENG: Your Honor, I've finished my cross, but
21 my colleague, Mr. Yao, wanted to continue the cross. Would
22 that be allowed?

23 THE COURT: Why? It's really -- the usual procedure
24 is one attorney asks questions on direct, one on cross. Why
25 do you need to have two attorneys asking questions on cross?

Hatch - cross by Yao

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1 MR. YAO: I could hand him the questions if you
2 prefer, your Honor. I could just hand him my questions so he
3 can finish.

4 THE COURT: What, did you divide the subject areas?

5 MR. YAO: I'm sorry?

6 THE COURT: Did you divide the subject areas?

7 MR. YAO: Sort of, yes.

8 THE COURT: How long is your cross going to be?

9 MR. YAO: Probably like ten minutes max.

10 THE COURT: Go ahead and do it. No, you can do it.
11 If these are your questions, go ahead and ask them. But try
12 and restrict it to one attorney on direct, one attorney on
13 cross.

14 MR. YAO: All right. Thank you, your Honor. I do
15 apologize.

16 CROSS-EXAMINATION

17 BY MR. YAO:

18 Q. Mr. Hatch, earlier during your direct examination, you
19 examined defendants' accused product, correct?

20 A. I've examined the accused products, yes.

21 Q. Have you examined plaintiffs' own products?

22 A. That was not part of my analysis. That would -- that
23 should not be part of my analysis.

24 Q. Okay. Have you -- but you did examine plaintiffs' claimed
25 design and patents-in-suit, correct?

1 A. I examined the claimed design in all of the
2 patents-in-suit, yes.

3 Q. And you were -- have you examined Defendants' '857 patent?
4 Have you examined that?

5 A. The '857 was not part of the design infringement, as I
6 understand.

7 Q. And earlier, you indicated the ordinary observer test, it
8 has a low -- low -- sort of low level attention, correct?

9 A. The hypothetical ordinary observer would apply a low level
10 of attention to details.

11 Q. And in that, you also included that they would consider
12 the price, maybe location or other different factors when they
13 considered the products, correct?

14 A. No. The purchaser would consider other factors, not the
15 hypothetical ordinary observer as a construct.

16 Q. Well, aren't you confusing the ordinary purchaser with the
17 hypothetical ordinary observer in this case?

18 A. No.

19 Q. What is your basis?

20 A. I --

21 Q. Well, because -- let me rephrase that because you did
22 mention about if we go back to your PowerPoint real quick.

23 Let's talk about the low level attention you were
24 talking about. How -- why is your understanding of a
25 hypothetical ordinary observer different from what the Federal

1 Circuit has laid out in the *Egyptian Goddess* case?

2 A. My understanding aligns with the correct interpretation of
3 that. It's not in conflict.

4 Q. In your report, you quoted -- I'm sorry, not in your
5 report. It says: The ordinary observer is one who is not an
6 expert in the claimed design but rather one of ordinary -- I'm
7 sorry -- a consumer use or the parent user each having little
8 or no experience purchasing hoverboards.

9 You did write that in your declaration, correct?

10 A. Yes. I think you just quoted from two separate parts.
11 Some of that was --

12 Q. The second part where I said the consumer -- a consumer
13 user or the parent of a user, each having little or no
14 experience of purchasing hoverboards, that's your
15 understanding of the hypothetical ordinary observer, correct?

16 A. That's describing the purchaser who we use to inform us of
17 the acuity that an ordinary observer would apply. I think
18 that's outlined there.

19 Q. And then you also said that you said the ordinary observer
20 encounters products --

21 (Court reporter interruption.)

22 BY MR. YAO:

23 Q. So in your report, you also talk about the ordinary
24 observer also encounters products in brick-and-mortar stores
25 like Wal-Mart, Best Buy or online stores, correct?

1 A. Yes, the purchaser in real life would encounter the
2 product in question in those situations, yes.

3 Q. So wouldn't you consider -- what you're saying is you're
4 considering ordinary purchaser is the same thing as a
5 hypothetical ordinary observer, correct?

6 A. That's not what I said, no.

7 Q. But based on -- based on this what you wrote in your
8 declaration, you're confusing an ordinary purchaser with a
9 hypothetical ordinary observer, correct?

10 A. No, I'm not confusing them.

11 Q. Well, you did said that they would encounter products at
12 the, you know, brick-and-mortar stores and they would take
13 into consideration of the price and other stuff while they
14 were looking at the products.

15 Does'n't that deal with more of consumer behavior and
16 their purchasing habits, rather than looking at a product as
17 an ordinary observer?

18 A. It's important to understand how the purchaser looks at
19 the accused product. That's not about trying to find out the
20 habits as such but to find out with what level attention do
21 they pay when they're looking at the products. We seem to be
22 stuck on the same point.

23 Q. Well, let's talk about the new report you submitted for
24 this motion for preliminary injunction.

25 You read the Federal Circuit decision, correct?

1 A. Correct, yes.

2 Q. And you attempted to cure your deficiencies criticized by
3 the Federal Circuit, correct?

4 A. In what way do you mean?

5 Q. Well, you did -- for example, if we go back to your
6 previous reports for the federal injunction, all you did at
7 least -- you grouped all the accused products together with
8 the patents-in-suit and you called that a comparison, but,
9 however, in this one you put -- you did Group A products with
10 the patents-in-suit and the prior art, correct?

11 A. The analysis was previously done, looking at every product
12 individually. However, to be clear in the report, it was
13 important to respond to the request by the Federal Circuit to
14 clearly demonstrate each separately. So I did that, but there
15 was no opinion change or change of analysis.

16 Q. But what you did essentially is to cure the deficient or
17 inconclusive analysis laid out by the Federal Circuit,
18 correct?

19 A. No.

20 Q. Why would you say that?

21 A. I did not change my opinion. My analysis did not change.
22 Only the format of how I presented the work, but the exact
23 same pictures were presented in my previous declarations.
24 There was no curing of something that was missing. It was
25 more reformatting.

1 Q. Well, certainly in this report, you did one comparison of
2 Group A products with the patents-in-suit and the prior art
3 compared to your first report, you simply group all of them
4 together and in addition -- well, why was there a sudden
5 change?

6 A. I believe we covered that. So the analysis was exactly
7 the same. The format changed because in respect to the
8 Federal Circuit, they would like to see it more clearly
9 itemized separately or presented separately, so that's what I
10 did. I changed the presentation layout, but the content was
11 all there. The analysis was all there in the original.

12 Q. But in your report, you only included top and perspective
13 view, correct, in your most recent submitted report?

14 A. That's also incorrect.

15 Q. Were you aware that expert discovery closed on
16 October 23rd, 2022?

17 THE COURT: That's an argument for -- I'm sorry.

18 That's an argument for me, not for the witness. If
19 you want to raise issues about whether the expert report
20 was -- the revised expert report was timely, we can address
21 that, but -- with the lawyers, but not with the witness. It's
22 not his issue.

23 MR. YAO: Okay. I don't have any further questions,
24 your Honor.

25 THE COURT: All right. Any redirect?

1 MR. BERKOWITZ: No, your Honor. Thank you.

2 THE COURT: Okay. The witness is excused. Thank
3 you, sir.

4 THE WITNESS: Thank you, your Honor.

5 THE COURT: I'll let defendants call their witness to
6 allow him to get on and off the stand and travel back to North
7 Carolina.

8 MR. CHENG: Sure, your Honor.

9 THE COURT: Sir, please raise your right hand.
10 (Witness sworn.)

11 THE WITNESS: I do.

12 THE COURT: All right, have a seat, please.

13 JAMES GANDY, DEFENDANTS' WITNESS, DULY SWORN,
14 DIRECT EXAMINATION

15 BY MR. CHENG:

16 Q. Hi, Mr. Gandy. Can you give us a brief introduction about
17 yourself and your experience as a patent examiner at the USPTO
18 and the other relevant work experience?

19 A. Yes. My name is James Gandy. I worked at the United
20 States Patent Office from 1972 until 2005 as a design patent
21 examiner, as a supervisor, and as the practice specialist for
22 the design patent technology center.

23 Since retiring, I have been an advisor to attorneys
24 at times on the filing of design patent applications, and I
25 have done expert witness work in a number of cases.

1 Q. And, Mr. Gandy, let's just cut into the prior art, the
2 '906 patent here.

3 Why do you think the D '906 patent is important for
4 the infringement analysis in this case?

5 A. Mainly, I think it's because it has the overall hourglass
6 shape. It has the relatively flat top surface that extends
7 over -- a relatively flat surface that extends over the main
8 body of the top of the design, and also it shows the same
9 substantial contour to the front and rear surfaces of the
10 hoverboard that is claimed in the two design patents.

11 Q. And what about the wheels, the fenders, the things the
12 Court asked -- is there any difference between a feature that
13 was claimed by a design patent and a feature that was
14 disclosed in a design patent as the wheel cover in this case?

15 A. It's always been my understanding that a design patent can
16 be used for everything that it discloses, not only the subject
17 matter that's claimed, but also whatever might be shown in
18 broken lines as part of the article in which the design is
19 embodied.

20 Q. So in other words, the -- what the effects of this wheel
21 cover that was disclosed in the '906 patent, how is that
22 relevant to the infringement analysis?

23 A. Well, it's relevant in that it does show that you can have
24 a wheel cover, an arcuate-shaped wheel cover over the wheels
25 of the hoverboard.

1 THE COURT: What's an arcuate-shaped wheel cover?

2 Speak into the microphone.

3 BY THE WITNESS:

4 A. It would be like a semicircular shape or curved shape, a
5 rounded shape.

6 THE COURT: Arcuate I have never heard before.

7 THE WITNESS: I've used the term arcuate many times
8 in my career at the Patent Office.

9 THE COURT: I've used it never in my career.

10 Go ahead.

11 BY MR. CHENG:

12 Q. And from comparing the '906 patent to the two
13 patents-in-suit, what can we -- why should we even compare
14 those two, the prior art with the two patents-in-suit?

15 A. Well, I think it's because the prior art, the '906 patent
16 basically shows substantially all of the general features that
17 are in the two design patents that are in this case, that is,
18 the hourglass shape, the relatively flat top surface across
19 the main body, as well as the contour of the front and rear
20 surfaces and also wheel covers over the wheels.

21 Q. And to your opinion, are those features relevant to
22 infringement analysis?

23 A. I think based on what the recent CAFC decision said is
24 that they become background information, but then once they're
25 shown in the prior art, you have to look at other features for

1 the purpose of determining whether the claimed design and the
2 alleged infringing products are not similar.

3 Q. So essentially you're saying different features should be
4 given different weight or value in infringement analysis?

5 A. Well, I think the features that are shown in the prior art
6 no longer become the primary features for the purpose of
7 determining infringement.

8 Again, I think, you know, the CAFC clearly set that
9 out that they become more background features and that now you
10 have to look at other features of the claimed design and the
11 alleged infringing products to determine whether they are
12 sufficiently close to be considered infringing.

13 Q. Is there any comparison you wanted to show us that will
14 demonstrate the other feature that you just mentioned?

15 A. Yeah, sure. I think if you want to pull up the -- one of
16 the two design patents, as well as the three Gyroor products
17 that are alleged to be infringing, we can look at them and
18 compare them.

19 Q. Do you want to -- an overlay? What slides do you want?

20 A. Well, we can start with the top plane views.

21 Q. Of the --

22 A. Of the -- one of the two design patents. It doesn't
23 matter. It can be either one. And then the three Gyroor A, C
24 and E.

25 Q. Yes, so let's just do -- like the picture in front of you?

1 A. Yeah, yeah. I mean if we want to look at the top plan of
2 what would be the Gyroor A in the prior art and the D '723
3 patent, if the hourglass shape and the relatively flat surface
4 across the top of the main body of the design become more of
5 background, you have to look at what the other features are in
6 that view that would show that they were either substantially
7 similar or substantially different over the -- over the
8 claimed design, the '723 design patent.

9 In this instance, I think what you would have to look
10 at is the foot pads and the difference in the shape and the
11 surface treatment. The surface pattern on the foot pads I
12 think become more important in determining whether they're
13 substantially similar or substantially different.

14 Also, if we look at the front views of those three of
15 the prior art, '906 prior art with D '723 patent, what I was
16 saying about the front view, that the contour, the shape and
17 contour of the front surface in the prior art and D '723
18 patent are substantially the same, whereas in the Gyroor A
19 hoverboard, it actually is different because the center
20 portion of the top surface actually drops down below the foot
21 pads on each end, which creates a different visual impression.

22 Q. You're talking about the middle here --

23 A. Yes.

24 Q. -- for the contour?

25 A. Yes, and because of that recess, when you look at the '906

1 prior art and you look at the D '723 design in the top view,
2 the surfaces across the entire hoverboard appear to be
3 continuous, appear to be just a continuous surface, whereas in
4 the Gyroor A hoverboard, because the center portion is
5 recessed, you get a distinct visual impression of the foot
6 pads, the opposing foot pads, which are raised up above it.
7 You don't get this continuous smooth transition from one side
8 to the other like you do in the '906 prior art and the D '723
9 patent.

10 As we go along here, what I want to go ahead and
11 indicate because, you know, you might start thinking, well,
12 you're picking out, you know, different features.

13 Well, when you're looking at the -- comparing the
14 overall appearance of an alleged infringing product and the
15 claimed design, it's all of the features on all of the
16 surfaces that are being claimed that have to be looked at and
17 considered as a whole in making a determination as to whether
18 they have a similar appearance or a dissimilar appearance.

19 So if I'm pointing out features on one surface or
20 another surface, what I'm looking at is combining them
21 all together is what you consider when determining whether
22 there's infringement.

23 Q. So you do think analysis between different features is
24 important to form the overall impression of --

25 A. Yes, I do. I don't think the infringement analysis is

1 that much different than the patentability determination
2 analysis.

3 When you're determining patentability of a claimed
4 design in an application, you're looking at all of the
5 features that make up that overall appearance and compare them
6 to the prior art to determine whether that overall appearance
7 is distinct over the prior art. You have to consider all of
8 the features that make up the claimed design.

9 Q. And as you previously mentioned, some features should be
10 given more weight and some features should be given less
11 weight depend on whether or not they were disclosed in the
12 prior art?

13 A. Yeah. I think if it's disclosed -- if features are
14 disclosed in the prior art, they become less relevant with
15 regards to the question of infringement. At least that's what
16 the CAFC certainly seemed to be saying, and they did say then
17 you have to start looking at other features as to whether they
18 distinguish one over the other.

19 Q. And two more questions on this slide.

20 Why should the bottom view matter? Because, you
21 know, when people stand on this hoverboard, they don't usually
22 see the bottom of the hoverboard.

23 A. Yeah, well, that's normally the case, but in this fact or
24 in this case, the design, the claimed design in the '723
25 patent was claiming the bottom as part of the ornamental

1 design.

2 And whatever you're showing in solid lines and you're
3 claiming as part of your design, you have to consider them for
4 the purpose of, you know, infringement.

5 So in this instance, even though the bottom might not
6 normally be visible, clearly the bottom of the Gyroor A
7 hoverboard has features on it that are different than the
8 prior art and the D '723 patent.

9 The prior art and the D '723 patent are substantially
10 plain, they have like a rounded surface, but they have no any
11 kind of ornamentation on them, whereas the Gyroor and A
12 hoverboard does.

13 THE COURT: Does any of your analysis deal with
14 functionality? Does that have any role from this injunction
15 hearing?

16 THE WITNESS: No, no. If what's being claimed in
17 solid lines as the ornamental design, that would have to be
18 considered ornamental and not functional.

19 THE COURT: That would be considered that or is part
20 of the analysis whether that acts as a -- in a functional way
21 and has to be disregarded?

22 THE WITNESS: No, I don't -- I don't agree with that.
23 I think that when you're dealing with potentially the issue of
24 functionality in design patent, if you can show that something
25 can be done in different ways and have a different appearance

1 and still perform the same function, then it would have to be
2 considered clearly primarily ornamental rather than primarily
3 functional.

4 THE COURT: All right. Thank you.

5 BY MR. CHENG:

6 Q. And Mr. Hatch also mentioned that D '906 patent doesn't
7 have foot padding. However, the D '723 patent had the foot
8 padding, and because '723 has the foot padding and the accused
9 product A have the foot padding, they are somehow closer to
10 each other.

11 Do you agree with that analysis?

12 A. No. I don't agree with that because what we have to look
13 at in this instance is the '906 prior art design patent was
14 the first hoverboard ever invented. So hoverboards that would
15 be designed after that may have additional features on them
16 that are not in the prior art, and if it's not in the prior
17 art, what's considered the best prior art reference, that
18 doesn't mean that the alleged infringing product is -- is
19 infringing the claimed design, in this instance '723.

20 You have to look. Once you see that there are
21 features that are not in the prior art, then you have to start
22 evaluating those features between the alleged infringing
23 product with the claimed design, in this instance, the '723
24 patent.

25 Q. So you're saying the idea of adding the foot pad is not

1 protected by the D '723 patent?

2 A. Could you rephrase that?

3 Q. Sorry. So you're saying the concept of putting a standing
4 pad on the D '23 patent as an improvement from the '906 patent
5 is not protected by the D '723 patent?

6 A. Well, I mean, it's not protected in the sense by itself.
7 It's part of the overall design of the '723 hoverboard, so
8 it's part of the ornamental design that's being claimed.

9 Q. Is the idea being claimed?

10 A. No, no, it's the -- it's the appearance, the shape and
11 appearance.

12 What's being claimed in a design patent is the shape
13 and appearance of a design embodied in an article of
14 manufacture. So all of the features that would be shown in
15 the design in solid lines are considered part of the
16 ornamental design being claimed for an article of manufacture.

17 Q. And the D '723 patent have a different design with the --
18 compared with accused product A on the top surface?

19 A. Yes. As I indicated before, visually when you look at
20 the '723 design patent and the prior art, '906 patent, they
21 have what appears to be from right to left a continuous
22 surface that is uniform, whereas in the Gyroor A hoverboard
23 because the center portion is recessed, it creates this visual
24 distinction of two opposing foot pads that are not continuous
25 with the center portion.

1 Q. And is that noticeable to an ordinary observer?

2 A. I think it would be.

3 Q. And the front view, aside from that what you mentioned has
4 the contour of the accused products is different, is there
5 anything else that would separate the accused product A from
6 the D '723 patent?

7 A. Yeah, yeah. I mean, the lights on the front surface
8 clearly have a distinct appearance over the lights that are
9 shown on the '723 patent.

10 And, again, because the contour of the front and rear
11 surfaces in the '723 patent are shown in the '906 prior art
12 patent, they become more background features, and so you have
13 to look at the other features that might be on that surface as
14 having relevance to the question of infringement.

15 And in this instance, the lights on the Gyroor A
16 hoverboard are very narrow, elongated, rectangular-type shape,
17 whereas the lights on the '723 patent are more almost like a
18 parallelogram shape.

19 THE COURT: The lights on the '723 --

20 THE WITNESS: The '723 are more like a parallelogram
21 shape.

22 THE COURT: You're looking at Figure 3.

23 THE WITNESS: Figure 3, yes.

24 THE COURT: It's the -- looks like an oval with a
25 line bisecting or at an angle across it; is that correct?

1 THE WITNESS: Right.

2 THE COURT: Okay. That's what the lights are
3 represented as in the '723?

4 THE WITNESS: Right, yes.

5 THE COURT: All right.

6 BY MR. CHENG:

7 Q. And this one shows kind of half of the hoverboard top
8 design together with the fender. How significant do you think
9 the shape of the fender affects the overall perception of an
10 ordinary observer?

11 A. Oh, I think it has a significant impact on the overall
12 appearance. I don't think -- I don't see how, in my opinion,
13 when you look at these two, I think the difference in the
14 shape of the fenders just jumps right out at you. I don't see
15 how you can say that they're insignificant.

16 Q. Okay. And so to the extent, I think Mr. Hatch used the
17 term overall appearance without getting to the detailed
18 analysis, do you think that is consistent with the Federal
19 Circuit's opinion?

20 A. No, I don't. Mr. Hatch's statement that just broadly
21 stating that the overall appearance between the claimed
22 hoverboard and the accused products are not clearly dissimilar
23 is just a -- I don't see where he has any support for making
24 that statement. He hasn't identified what it is that makes
25 them not dissimilar.

1 Q. Isn't the overall perception sufficient to support the
2 finding of the differences?

3 A. Yeah, I mean, you're making the determination based on the
4 overall appearance, but you're making that based on -- the
5 overall appearance based on all of the features that make up
6 the entire design.

7 Q. So in your opinion, just to the term overall experience
8 without getting into the features is insufficient to support a
9 finding of substantial similar or substantial dissimilar?

10 A. Yeah, I think it's just a subjective, you know, statement
11 without having any support as to what are the features that
12 you're relying on to say that they're dissimilar.

13 MR. CHENG: Can we look at the pink one, the product
14 C?

15 BY MR. CHENG:

16 Q. And the reason I brought up this one is because opposing
17 party, plaintiffs have mentioned that this product looks more
18 similar since -- this is product C -- the cover is kind of
19 extended over the wheel; but in your opinion, is this
20 substantially similar to the D '723 patent?

21 A. No. Again, I think, you know, you have to take more than
22 just the wheel covers. I mean, yes, the wheel covers on the
23 Gyroor C are more rounded, but they actually are wider and
24 they have a flatter appearance on the top, whereas the '723
25 design patent, the wheel covers actually have a curvature to

1 them. So there are some differences between the wheel cover
2 in the Gyroor C and the D '723 design patent.

3 And, again, when you're looking at all of the
4 features that are on the Gyroor C and the D '723, particularly
5 again in the top view. As I said, the '723 kind of has this
6 continuous, what appears to be just this continuous surface
7 from right to left, whereas the -- in the Gyroor C, you again
8 have a recessed center area so that the opposing pads appear
9 to be separate from the center portion. It's not a continuous
10 flow to it.

11 And also in the center area on the top surface of the
12 Gyroor C, you have these almost boomerang-shaped features that
13 are not shown in the D '723 patent that contribute to the
14 appearance of as you're looking at it.

15 Q. When you say the recessed area, are you referring to this
16 portion of the neck, kind of the hourglass?

17 A. You mean the recess?

18 Q. Yeah.

19 A. Yeah, yeah.

20 Q. From which angle?

21 A. I'm sorry?

22 Q. From which angle you were referring to?

23 A. From the top view.

24 Q. From the top view.

25 A. From the top view. Also from the side view, from the

1 front view, you can see the recess.

2 Q. So you're saying that the metal is curved inside instead
3 of bulged like in the prior art?

4 A. Yeah, the '906 prior art and the D '723 patent show a
5 convex contour in the center area, whereas the Gyroor C
6 hoverboard has a recessed surface, and this creates a distinct
7 appearance not only in the top but also when you look at it
8 from the front or the rear.

9 Again, you can see that the two end portions, the
10 foot pads, are separate from the center portions. There's no
11 continuous flow to them.

12 Q. And I think from the same slides, the bottom view, you
13 will have the same view as the product A that --

14 A. Yes.

15 Q. -- the ventilation, the speaker holes and the metal ribs
16 are also different from the --

17 A. Yeah, yeah, I mean, you have the ribs on them, and you
18 also have this just on the outside of where the center rib
19 portion, you have this arc, this rounded, this rounded
20 recessed edge that then defines the outer surfaces where you
21 have the perforated openings.

22 So whereas the '906 prior art and the D '723 design
23 patent, they have no ornamentation to them at all as far as
24 any details that -- like ribs or perforations. They're just
25 basically a plain surface.

1 Q. Okay. And is there anything else within this product C
2 that you think a feature might separate the product from --

3 A. Well, same thing in the front you have the lights. The
4 lights, again, have a completely different appearance in the D
5 '273 design patent, and they actually are recessed in so you
6 kind of get this -- this separation between the upper surface
7 and the lower surface that's created by these recessed lights.
8 Again, that has a visual impact on the overall appearance.

9 THE COURT: The ribs you're talking about are on the
10 underside on either side of the center perforation?

11 THE WITNESS: On the bottom.

12 THE COURT: On the bottom, right.

13 THE WITNESS: Yes, yes.

14 THE COURT: And on each side of that little --

15 THE WITNESS: Yes, yes.

16 THE COURT: -- separation --

17 THE WITNESS: Right, right.

18 THE COURT: -- that's on the picture?

19 Okay.

20 BY MR. CHENG:

21 Q. Let's do the other part, and we'll just go through this
22 very quickly. They're kind of similar.

23 As we have the slides here, do you -- yes, just go
24 through the similarity and differences in your opinions.

25 A. Okay, yeah.

1 Again, pretty much the same type of situation. The
2 top plan view, the Gyroor E, the center area is recessed.
3 Again, when you look at it, you can see it more when you're
4 looking at it in front, the front view, just below the top
5 plan view, you can see where it's recessed. And, again, it
6 creates this visual distinction of not being a continuous top
7 surface like the prior art, the '906 prior art and the D '723
8 design patent.

9 But, again, also the foot pads have a different
10 shape. They have a different surface pattern to them that
11 creates a different visual appearance along with the recessed
12 center area. When you take all of these together, you get --
13 you create this different visual impression.

14 Q. It has like a more round edge towards the center. Does it
15 matter for your analysis? Like the foot padding, it's not as
16 pointy as product A or --

17 A. Right, right, but it still has a different contour than
18 the foot pads in the D '723 patent. Along with the surface
19 pattern on it and the different shape in the peripheral shape
20 of the pads, that, to me, has a significant visual
21 distinction.

22 Q. And the front lighting is not recessed as product A or
23 product C and looks thicker. Does that change your analysis?

24 A. No. It doesn't change my analysis as far as, again,
25 creating a different visual appearance from the front and the

1 D '723 design patent, the lights on the front surface in the
2 Gyroor E are clearly different in their shape and appearance
3 than the lights shown in the D '723 patent.

4 Q. And the light is on one side of this product instead of
5 the other products, the light is on both sides, but this one's
6 only on one side. Does that change -- does that change your
7 analysis?

8 A. No. It doesn't change my analysis from an overall
9 standpoint. It's just that in this particular product, the
10 Gyroor E, the front rear surfaces are not identical as they
11 were in the A and C hoverboards.

12 Q. Then the bottom, I mean, the ventilation or the speaker
13 holes are significantly smaller than the other two products.
14 Also have ribs. Do you still consider the bottom view as
15 significantly different from the D '27 patent?

16 A. Yeah, I mean, if you just look at the bottom surface, it
17 certainly last a different look to it when you're considering
18 the ribs and the center part and the recessed ridge that
19 defines the outer edge of them, along with the perforations.
20 Clearly, you know, these are all features.

21 And what you're talking about as part as
22 functionality, they could be considered to be -- to have a
23 function, but they can be done in many different ways, and so
24 I would have to consider them more primarily ornamental rather
25 than primarily functional, and I think they have -- you have

1 to consider, since the bottom is claimed in the D '723 design
2 patent, you have to consider that as part of the analysis of
3 infringement. So you have to look at the bottom surface of
4 the alleged accused infringing product.

5 Q. Kind of catch the switch.

6 A. I guess the other thing is, again, the wheel covers on
7 these are different than the wheel covers on the D '723.
8 They're almost a pentagon -- not pentagon shape, trapezoidal
9 shape with a flat top surface, then they flare out on each
10 side, whereas the wheel covers on the D '723 patent are
11 rounded.

12 Q. Okay. And that is the way the D '723 patent. Although
13 they're very similar, the D '723 patent with the other one,
14 the A 25 -- is it A 25? Can we show the slides of the other
15 patent-in-suit?

16 THE COURT: Off the record.

17 (Discussion held off the record.)

18 THE COURT: Back on the record.

19 BY THE WITNESS:

20 A. That's the '256. Yeah, that's the one you want, isn't it?
21 That's the other design patent?

22 BY MR. CHENG:

23 Q. The other design patent. We can just use this one.

24 I mean, you do see the '723 and the '256 patent, they
25 have slightly different design. Does that change your

1 opinion, the overall analysis that you did? When we're
2 switching the '723 patent to the '256 patent, does that change
3 your analysis?

4 A. I don't quite understand what you're asking.

5 Q. Sorry. What we just did was compared the accused products
6 with '723 patent in light of the '906 patent. If we're
7 switching the '723 patent-in-suit to this '256 patent, does
8 that change your analysis?

9 A. No. I would consider the analysis to be virtually the
10 same.

11 Q. And one last question. When you did your analysis, you
12 didn't see the actual products but based your analysis on the
13 pictures of the products and the patents; is that correct?

14 A. Yes, that's correct.

15 Q. And does that affect your opinion --

16 A. No.

17 Q. -- without seeing the actual product?

18 A. What I kind of felt strange about being criticized about
19 that in my report is I thought that we don't see actual
20 products that are submitted to the Patent Office in design
21 patent applications. All our determinations on patentability
22 of a design patent are based on drawings or photographs
23 compared to the prior art, which are usually patents or
24 publication photographs.

25 So I don't see where having to have the actual

1 product is going to preclude you from being able to make a
2 proper analysis. We do that -- we did that or I did that and
3 the Patent Office does that every day in design patents.

4 Q. Just look at the pictures?

5 A. Just looking at pictures.

6 MR. CHENG: I have no further questions, your Honor.

7 THE COURT: All right, cross-examination.

8 Before you start though, I had made a comment earlier
9 about does plaintiff practice their patent so they have a
10 hoverboard that looks just like the patent.

11 I realize on reflection, that's not really the
12 analysis. The analysis is whether or not the defendants'
13 products infringe your patents, not whether your product
14 matches their product or there's a difference because that's
15 really not the infringement analysis we're supposed to engage
16 in.

17 So I mused earlier, but I probably should have done
18 it off the record, but it's not an important -- it's not even
19 a factor I can consider because that's not the analysis I have
20 to engage in.

21 Cross-examination.

22 CROSS-EXAMINATION

23 BY MS. STURM:

24 Q. Good afternoon, Mr. Gandy.

25 A. Good afternoon.

1 Q. So can you -- in your over 30 years of experience in the
2 Patent Office, did you conduct any infringement analyses?

3 A. No, no, that's not what -- that's not what you do at the
4 Patent Office.

5 However, as a patent examiner, as a supervisor and a
6 practice specialist, I always was looking at what decisions
7 were coming down based on patentability or infringement by the
8 district courts or the Federal Circuit.

9 Q. So you would say the legal standard for patentability that
10 you applied in the Patent Office is different than the legal
11 standard that you would apply here in your analysis of
12 infringement?

13 A. Yeah, there is a difference. Yeah, there's a difference.
14 What I would go ahead and indicate to you though is that when
15 you're determining patentability under 35 U.S.C. 102
16 anticipation, the standard is the ordinary observer, same as
17 what it is in infringement, but the difference in infringement
18 is the ordinary observer is familiar with the prior art.

19 Q. Right, and --

20 A. So there is some similarity when you're coming to -- when
21 you're determining the patentability on anticipation.

22 Q. Correct, and back just to the ordinary observer point, you
23 would say that the ordinary observer in this case is a
24 potential purchaser of hoverboards, correct?

25 A. That's correct.

1 Q. And you have no experience as a product designer; is that
2 correct?

3 A. I don't have any experience as a product designer, but I
4 do have experience as an architectural designer. I've
5 designed two houses and had them built since I've retired, and
6 I've designed furniture for my house. So I have done a lot of
7 designing.

8 Q. So does any of that design work, did that help you in your
9 analysis for the design of hoverboards?

10 A. Well, again, my background is an architectural design
11 person, so I clearly have a lot of design experience just from
12 my education.

13 Q. And your experience in infringement analysis is -- has
14 been solely been as a testifying expert; is that correct?

15 A. I'm sorry, could you repeat that?

16 Q. Yeah, let me rephrase that. Sorry.

17 So you have no experience in conducting infringement
18 analyses other than as a testifying expert; is that correct?

19 A. Yes, that's correct. Yeah, I've testified in the past on
20 infringement issues, but not when I was a patent examiner.

21 Q. All right. So let's turn -- just going to ask -- so you
22 did not review any physical examples of the accused products
23 prior to preparing your report --

24 A. That's correct.

25 Q. -- in this case; that's correct?

1 And all of the photos that you included in your
2 report were provided by defendants' counsel; is that correct?

3 A. That's correct.

4 Q. So looking at the patents, I guess the '723, you would say
5 that the '723 patent has raised foot pads; is that correct?

6 A. I'm sorry, has what?

7 Q. Has raised foot pads?

8 A. Yes.

9 Q. Yes. And you would say the same for the '256 patent?

10 A. Yes.

11 Q. Are you aware of any other prior art patents with raised
12 foot pads?

13 A. I haven't looked at any. I mean, there may be, but I
14 haven't looked at any as far as pointing out whether this has
15 been done maybe in patents or hoverboards that were patented
16 prior to these two.

17 THE COURT: By raised foot pads, do you mean the foot
18 pads have grooves in them, or do you mean they're higher than
19 the center of the -- you testified earlier the foot pads
20 appear higher than the center, at least on the --

21 THE WITNESS: On the accused products.

22 THE COURT: -- on the accused products.

23 THE WITNESS: Right.

24 THE COURT: And you just said there are raised foot
25 pads in these patents. Are you referring to the grooves on

1 the foot pads?

2 THE WITNESS: No, the foot pads themselves are
3 actually raised, and then you have a pattern of ribs on the
4 top surface of the foot pads.

5 THE COURT: Okay. Maybe we'll get to that with
6 pictures, side-by-side pictures.

7 BY MS. STURM:

8 Q. And so you didn't consider any other prior art that had
9 raised foot pads in your analysis; is that correct?

10 A. That's correct, yeah.

11 Q. And did you want to just take a look at those? Let's look
12 at the front view of the '256.

13 So you're --

14 THE COURT: I see. I'm sorry to interrupt you.

15 MS. STURM: No, you're good.

16 THE COURT: Are you talking about the slightly
17 elevated foot pads as you look at it from the cross -- from
18 the side view?

19 MS. STURM: Correct.

20 THE COURT: And that's what your testimony related
21 to.

22 THE WITNESS: Yeah, yeah, right.

23 THE COURT: Just want to make sure I understand.

24 THE WITNESS: I think with the Gyroor products, when
25 I'm referring to the foot pads being raised, the center area

1 is recessed, but not only is the foot pad raised, but the
2 actual pads themselves are also raised --

3 THE COURT: Okay.

4 THE WITNESS: -- on those surfaces.

5 THE COURT: Thanks. Thanks for clarifying that.

6 BY MS. STURM:

7 Q. And you would say that the '723 patent has fenders over
8 the wheels; is that correct?

9 A. Yeah, I don't have the '723 up here.

10 Okay. Yeah, go ahead.

11 Q. So you would say that the '723 patent has raised -- sorry,
12 has fenders; is that correct?

13 A. Yes.

14 Q. And the same for the '256; is that correct?

15 A. Yes.

16 Q. Are you aware of any prior art patents that have fenders?

17 A. Other than what's showed disclosed in the '906, I haven't
18 looked -- I mean, as far as my -- what I was retained for
19 here, I have not done any searching to see whether there's
20 other prior art patents out there that may have this. I'm
21 just looking at what was presented to me and the '906 prior
22 art.

23 Q. So you would say that none of the prior art patents that
24 were cited on the face of both the '256 and the '723, none of
25 those patents had fenders; is that correct?

1 A. I'd have to look at them again. I couldn't recall right
2 offhand whether they did or not.

3 Okay. Actually, the '991 does, the D 647,991.

4 Q. And you could tell that from a perspective view?

5 A. Sure.

6 Q. And would you say that the '723 patent has lights on the
7 front -- or what we could say is the front of -- front figure
8 of the patent? I think it's Figure 6 -- yeah, if you want to
9 go -- sorry.

10 A. Does it have lights on it?

11 Q. Yes.

12 A. Yeah. Yes.

13 Q. And you would say the same for the '256?

14 A. If you can pull it up.

15 Okay. Yeah.

16 Q. And, again, are you aware of any prior art patents with
17 lights, including lights on them?

18 A. Not that I'm aware of.

19 Q. And did you consider the '857 patent in your analysis,
20 defendants' patent?

21 A. No. No, I didn't.

22 Q. And did you consider any other later-filed patents in your
23 analysis?

24 A. No.

25 Q. So do you agree that later-filed patents are irrelevant to

1 your infringement analysis?

2 A. Later-filed patents, you mean after the issue date of
3 the '256 and the '723?

4 Q. That's correct.

5 A. Well, they wouldn't be considered prior art to theirs.

6 Q. So in a sense, they wouldn't be relevant to your
7 infringement analysis; is that correct?

8 A. I would have to say that's correct because they wouldn't
9 be prior art.

10 Q. You're aware that defendants have engaged multiple
11 infringement experts in this case, correct?

12 A. You mean multiple cases?

13 Q. No, in this case, are you aware that -- or you are aware
14 that defendants have engaged multiple infringement experts,
15 correct?

16 A. Yes, I am. I'm sorry, I didn't quite understand what you
17 were asking. Yes, I am.

18 Q. All right. And you were not aware of that prior to your
19 deposition of October 2022 earlier, correct, when --

20 A. That's right. I -- I know that they have another expert,
21 but I've never had any contact with that person.

22 Q. Correct. And just to clarify, that was plaintiffs'
23 deposition of you in October of 2022 that you first learned of
24 the other expert defendants have retained?

25 A. I think I knew that they had one, but, like I say, I've

1 never had any contact with him. I've never discussed him with
2 the attorneys for the defendant.

3 MS. STURM: I would like to admit into evidence the
4 deposition transcript from October 26, 2022, as Plaintiffs'
5 Exhibit 4.

6 THE COURT: Any objection?

7 MR. CHENG: No objections.

8 THE COURT: Admitted. Admitted without objection.

9 (Plaintiffs' Exhibit No. 4 was received in evidence.)

10 (Document tendered to the Court.)

11 THE COURT: Thank you.

12 BY MS. STURM:

13 Q. So if you could please turn to page 16, line 16.

14 A. Page 16, line 16?

15 Q. That's correct.

16 A. Okay.

17 Q. And when asked if you knew whether defendants had retained
18 any other experts in this case, you testified that: "I'm not
19 aware of that"?

20 A. I said that.

21 Q. "I have not been told that." Is that correct?

22 A. That may be the case. I just don't remember. I thought I
23 had learned about it before then. Maybe it was after that.

24 Q. So you have not reviewed any expert reports from
25 defendants' other expert; is that correct?

1 A. No, I have not. As I said, I've had no contact. I've
2 never seen anything from the other expert.

3 Q. So you were previously testifying up here that the foot
4 pads make the most impression of -- have the most -- the foot
5 pads have more of an impact on the overall visual impression;
6 is that correct?

7 Let me rephrase that. Sorry.

8 When you said -- you had previously testified that
9 the foot pads make more of an impression on the overall visual
10 appearance of the hoverboards; is that correct?

11 A. I said that in light of what the prior art shows with
12 respect to the hourglass, and, again, based on what the CAFC
13 said when you have the prior art shows what would be a
14 dominant feature like the hourglass and it's in the prior art,
15 it becomes more of a background. So then you have to start
16 looking at other features, and what I said is I think the foot
17 pads then become a very dominant feature.

18 Q. So you would say that you're looking at these features in
19 isolation; is that correct?

20 A. No, no. I'm always looking at them based on the overall
21 appearance.

22 As I indicated earlier when I started out, when I
23 talk about all these individuals, individual features, that's
24 part of the whole analysis from an overall appearance
25 standpoint. You have to look at all of the features as a

1 whole. That's what determines what the overall appearance
2 looks like.

3 MS. STURM: Thank you, Mr. Gandy.

4 Thank you, your Honor. I have no further questions.

5 THE COURT: Any redirect?

6 MR. CHENG: Yes, your Honor. Just a few questions.

7 THE COURT: All right.

8 REDIRECT EXAMINATION

9 BY MR. CHENG:

10 Q. One thing I want to clarify, the D '906 patent was filed
11 before the other two patents-in-suit but was granted
12 afterwards.

13 Does that change the fact the D '906 patent is still
14 a prior art to those two patents-in-suit?

15 A. Yes, having an earlier filing date, so it would be
16 considered prior art.

17 Q. So '906 is still the prior art?

18 A. Yes.

19 Q. And if -- I mean, without looking into other potentially
20 relevant patents, if the two patents, '723 and '256, if they
21 were the first design patent to have foot padding on them, was
22 that idea of adding foot padding protected by those two design
23 patents?

24 A. Well, the claim to a design patent goes to the overall
25 appearance of design, not to any individual elements. So, I

1 mean, if you put foot pads, since they were the first ones to
2 put foot pads on a hoverboard, that would be, you know, a
3 potentially new feature on the hoverboard.

4 But the claim again would be directed to the overall
5 appearance of the hoverboard. You don't get protection on
6 individual parts in a design patent.

7 Q. So the idea of whether or not there is a foot padding
8 added into later products are not protected, we are really
9 looking at the design or the shape or the lines or the figures
10 of those foot paddings?

11 A. I'm sorry, could you rephrase that?

12 Q. Sorry.

13 So I guess the design concept of having a foot pad is
14 not protected by the design patent, but really the look, the
15 appearance of those foot padding should be considered --

16 A. Yes.

17 Q. -- in infringement analysis?

18 A. Sure, sure.

19 Q. And it's the same for whether or not there were lighting
20 added to a later design patent. The idea of having a light to
21 the new patent is not protected. We should really look at the
22 shape or the position or the size of the light instead of the
23 concept of having a light?

24 A. Yeah, that's right. In those two patents, they had lights
25 on them, but when you've got later filed -- you got later

1 designs, not necessarily filed for patent, but you have later
2 designs that also may include lights, if those lights have a
3 different appearance, shape to them, then, you know, that
4 would be a difference.

5 Q. And just to summarize that, can you, in a very plain term,
6 explain the difference between the appearance and the concept,
7 the design concept, which --

8 A. Well --

9 Q. Okay.

10 A. -- you don't get design patents on a concept. You get
11 design patents on the actual specific shape and appearance to
12 an article of manufacture.

13 So when you're making a reference to design concept,
14 you don't -- design patents don't cover design concepts. They
15 cover specific shapes and appearance to a new design embodied
16 in an article of manufacture.

17 Q. And when we're talking about shape and appearance, we're
18 talking about, like, what would constitute as the shapes and
19 appearance?

20 A. Well, in this instance, if you're claiming as in the two
21 patents basically the overall appearance of the hoverboard,
22 obviously some of the features were in broken lines, but all
23 of the parts that are in full lines were what would be
24 considered the claimed design.

25 So you're looking at patentability based on just that

1 overall appearance, not on any individual elements. Same with
2 respect to infringement.

3 MR. CHENG: Thank you, your Honor.

4 Thank you, Mr. Gandy. No further questions.

5 THE COURT: Any additional cross-examination based on
6 the last questions?

7 MS. STURM: No, your Honor.

8 THE COURT: All right, sir, you're excused. Thank
9 you.

10 THE WITNESS: Thank you.

11 THE COURT: Okay. What do we have left on witnesses,
12 and can we finish them today?

13 MR. LOMUSCIO: We have Mr. Bero, your Honor.

14 THE COURT: All right. And he's where, in Wisconsin?

15 MR. LOMUSCIO: He's in Wisconsin. He's available
16 remotely.

17 THE COURT: And where is your -- you have another
18 witness, too, correct?

19 MR. CHENG: Oh, no, your Honor.

20 THE COURT: You're not.

21 MR. CHENG: Mr. Rake was scheduled next week.

22 THE COURT: Okay.

23 MR. YAO: Is scheduled next week.

24 THE COURT: Okay. Mr. Rake is your other -- why
25 don't you sit down so you're in front of the mic.

1 What is he going to testify to?

2 MR. CHENG: He's going to testify to the
3 non-infringement nature of the products.

4 THE COURT: Okay. All right. And he's going to
5 testify remotely or come into court?

6 MR. CHENG: He's going to come to the court.

7 THE COURT: All right. Where is he from?

8 MR. CHENG: He's based in Kentucky?

9 THE COURT: All right.

10 MR. CHENG: Sorry, Kansas.

11 THE COURT: That's fine then. Let's hear from the
12 remote witness now.

13 How long do you expect his direct examination to be?

14 MR. LOMUSCIO: Twenty minutes, your Honor.

15 THE COURT: Oh, good. Let's -- why don't we take a
16 ten-minute break right now so we can get him set up, but we'll
17 take a ten-minute break.

18 MR. LOMUSCIO: Thank you, your Honor.

19 MR. CHENG: Thank you, your Honor.

20 (Recess from 3:04 to 3:13 p.m.)

21 THE COURT: All right. Looks like -- we're off the
22 record.

23 (Discussion held off the record.)

24 THE COURT: We can go back on the record, and please
25 call your next witness.

Bero - direct by Lomuscio

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1 MR. LOMUSCIO: Plaintiffs call Richard Bero.

2 THE COURT: Okay. Mr. Bero, can you hear me?

3 THE WITNESS: Yes, I can.

4 THE COURT: You're on mute. I can't hear you.

5 THE WITNESS: Can you hear me? I can hear you.

6 THE COURT: All right. We can hear you, too. You
7 have to speak up a little, but we can hear you.

8 Please swear in the witness.

9 (Witness sworn.)

10 MR. LOMUSCIO: May I proceed, your Honor?

11 THE COURT: You may.

12 RICHARD BERO, PLAINTIFFS' WITNESS, DULY SWORN,

13 DIRECT EXAMINATION

14 BY MR. LOMUSCIO:

15 Q. Good afternoon, Mr. Bero. Could you please introduce
16 yourself for the record.

17 A. Sure. My name is Richard Bero, and I have a company
18 called The Bero Group, and we provide financial and damages
19 and valuation services, generally speaking.

20 THE COURT: Is there a way to up the volume here?

21 MR. YAO: It's tough for us to hear.

22 THE COURT: We're going to try it from our end,
23 Mr. Bero. Maybe you just have to speak up, but see if we can
24 raise the volume at our end here.

25 THE WITNESS: How about now, is that okay?

Bero - direct by Lomuscio

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1 THE COURT: A little better.

2 THE WITNESS: Can you hear me?

3 THE COURT: I think you're right though. It's only
4 going through the TV and not through the court mics. Why
5 don't you say your name again? Let's see if it gets any
6 louder.

7 THE WITNESS: My name is Richard Bero.

8 THE COURT: All right. That's as good as we're going
9 to get. I think everyone just needs to listen carefully. So
10 go ahead.

11 BY MR. LOMUSCIO:

12 Q. Mr. Bero, what type of company do you work for?

13 A. I have a company called The Bero Group, and we provide
14 litigation consulting, financial valuation types of services
15 in cases such as this one.

16 Q. And so have you testified in patent cases before?

17 A. Yeah. I've testified on probably close to a hundred
18 patent cases.

19 Q. And who retained you for this case?

20 A. I was retained initially on behalf of the plaintiffs by a
21 law firm by the name of Loeb & Loeb.

22 Q. Who are the plaintiffs? When I say retained, who are the
23 plaintiffs who are the plaintiffs in this case?

24 A. Hangzhou Chic.

25 Q. And were you also retained by Unicorn Global?

1 A. Correct, correct.

2 Q. And what is Hangzhou Chic?

3 A. So my understanding of Hangzhou Chic is it's a
4 manufacturer and developer of hoverboards and hoverboard
5 technology and has 400-plus patents and so forth on
6 hoverboards.

7 Q. And what is your understanding of Unicorn?

8 A. Unicorn, as I understand, is an exclusive licensee of
9 Hangzhou Chic for sales and distribution of hoverboards in the
10 United States.

11 Q. And you'd testified earlier you've done work in patent
12 cases. What is the value in your experience of having a
13 patent?

14 A. Well, just generally speaking, the value, it can take form
15 in lots of different fashions certainly, but it essentially
16 provides a monopoly, a patent owner has a monopoly over that
17 particular technology, that particular patent to disallow
18 others from using it in the marketplace.

19 Q. Does a patent holder also have the ability to license that
20 patent?

21 A. Certainly, yes.

22 Q. What is the impact of infringement on the value of a
23 patent?

24 A. Well, again, it depends on the facts and circumstances of
25 the type of infringement, but when you have, as we have here,

1 direct competitors, it tends to diminish the value of that
2 particular patent, and it can take -- it can take shape in a
3 variety of different forms. It can take shape in the form of
4 lost royalties, lost sales, lost profits, additional pricing
5 pressure that otherwise wouldn't exist.

6 You know, it really can -- you know, again, it
7 depends on the facts and the circumstances of the particular
8 patent and type of infringement and relationship between the
9 patent owner and the infringer.

10 Q. And did you provide, in connection with the pending
11 preliminary injunction motion, a declaration?

12 A. Yes, I did. I've prepared a number of declarations in
13 this matter.

14 Q. And focusing on the most recent declaration that you
15 prepared, did you provide any opinions in that declaration?

16 A. Yes. Essentially, I provided two what I would describe as
17 high-level opinions, and one has to do with the issue of
18 nexus, the causal nexus, and the other one has to do with the
19 issue of irreparable harm.

20 Q. And focusing on the causal nexus point first, what did you
21 conclude based upon your analysis as to the causal nexus in
22 this particular case?

23 A. Well, I concluded based on -- I was asked to look at two
24 issues. One is the issue of direct competition, and the other
25 was the issue of commercial success. My understanding is that

1 to the extent those exist in a case, that tends to suggest a
2 more likely causal connection between the infringement and
3 the -- and the demand for the patented products, or
4 vice-versa, I guess I should say.

5 And so essentially at a high level, those are the two
6 issues I looked at with regard to the causal nexus.

7 Q. And so with regard to competition, who are the competitors
8 you reviewed in connection with this particular case?

9 A. Well, it's Hangzhou Chic, but as I understand it, Unicorn
10 Global is the primary U.S. distributor, as the exclusive
11 licensee of products in the U.S., but Hangzhou Chic certainly
12 has sold products into the U.S. as well.

13 So on the one hand, you have those two parties that
14 are selling the patented products, the plaintiffs' products;
15 and then on the other hand, you have the accused infringers in
16 this case. My understanding, I know we went through it
17 earlier today the list of the entities, but we've been
18 referring to those entities as the Gyroor defendants and their
19 products.

20 Q. And what are the products that plaintiffs Hangzhou Chic
21 and Unicorn and the defendants, the Gyroor defendants, what
22 products do they compete with regard to?

23 A. Well, as I indicated, certainly the hoverboards, and
24 we've -- I think your Honor mentioned it right in the opening,
25 we have direct competitors, and that's my understanding and

1 that's what I've seen from the information on the plaintiffs'
2 side in declarations they've provided sort of the approach
3 they've taken in this case and being concerned about the
4 alleged infringement that's taken place.

5 And then we also see that the companies are selling
6 through similar kinds of distribution and primarily on that
7 note, selling through Amazon. And the majority of the sales,
8 as I understand it again, that the defendants have been
9 selling through is online and largely Amazon, which is also
10 where the plaintiffs sell their products.

11 Q. And in terms of looking and determining the existence of
12 competition between the parties, what did you analyze with
13 regard to that?

14 A. Well, certainly, you know, I've reviewed the legal
15 filings, and it's evident that -- and part of those
16 declarations of -- there are a couple of different
17 declarations of some of the Unicorn people. I believe there
18 are -- and, again, the names changed over time, but the focus
19 was or the declarations were that these companies compete with
20 each other.

21 That's part of the information. I've looked at
22 websites. I'm not a technical expert, so I don't know what
23 infringes versus doesn't infringe, but I understand some of
24 the products that are accused of infringement. Both companies
25 sell hoverboards, and Hangzhou Chic is one of the largest

1 market participants selling hoverboards in the United States.

2 Q. With regard to your declaration, you also said you looked
3 at commercial success. What does that mean?

4 A. Well, commercial success is -- I suppose it's somewhat of
5 a vague term, but what we look at in patent cases, we look at
6 it, there's different ways to look at it, but, you know,
7 generally speaking if a product is selling and it's successful
8 in the market, that would demonstrate commercial success.
9 That would certainly indicate commercial success.

10 Q. And with regard to the sales in this case, did you see an
11 indication of commercial success with regard to the patented
12 products?

13 A. Certainly. The data that we have was leading up to I
14 believe the -- there were different hearings and so forth and
15 injunction hearings and so forth as I understand.

16 Initially, we looked at data that went up from 2019
17 through September of 2020, so a little less than two years.
18 And during that period of time, Hangzhou and Unicorn sold I
19 believe it was 230,000 hoverboards, and they were selling --
20 they sold over \$50 million worth of hoverboards, which in and
21 of itself -- patented hoverboards, I should say, what I
22 understand to be patented hoverboards.

23 So there alone, that's certainly an indication that
24 these products have been commercially successful.

25 Q. And based upon your analysis of both the competitive

1 elements and the commercial elements, what was your first
2 opinion with regard to the patented products in this case?

3 A. Well, again, it's my understanding that an indication of
4 direct competition, such as we have here, and commercial
5 success, such as what we have here, is an indicator of the
6 nexus and -- the causal nexus. And so looking at it through
7 that lens, that has certainly been the case.

8 Q. And you testified earlier that you provided a second
9 opinion with regard to the declaration provided in this case.
10 What was that second opinion?

11 A. Yeah, the second opinion has to do with whether there is
12 likely irreparable harm. And, you know, given what I've seen
13 and what I'm aware of, which is, quite frankly, some limited
14 information that's based on what the defendants have produced
15 or haven't produced, provided, that's not for me to determine
16 whether that's proper or not certainly, but it would appear
17 based on the limited information I have that irreparable harm
18 is likely.

19 Q. And what, in coming to that conclusion, what did you focus
20 on in connection with your analysis?

21 A. Well, it really boils down to one piece of information.
22 One of the things that I would like to look at is the number
23 of sales that the defendants have made of the accused products
24 and how much money it was making and so forth and really kind
25 of work our way towards a damages analysis and get in

1 effect -- a sense for the effect in the market from a
2 quantitative perspective.

3 We don't have that in this case. Obviously it's
4 early from that sort of a viewpoint. But one of the pieces of
5 information I thought was telling and really underlies this is
6 a few weeks before the August 2021 hearing, the Gyroor US
7 defendants indicated, somebody had -- I believe had a
8 declaration or maybe it was in the motion, but said that they
9 were going to go out of business by the end of the month,
10 which was August of 2021, if the protective order or the
11 injunction, excuse me, was not dissolved, and that suggested a
12 couple of things to me.

13 First of all, based on the other available
14 information, which is the amount of frozen assets that was
15 provided to the plaintiffs through -- by Amazon, Gyroor USA
16 was far and away the largest or had the largest amount of
17 frozen assets.

18 And then if they were so dependent on these products,
19 that suggests that there's not much else they are selling,
20 which calls into question whether or not they have a solid
21 foundation, financial foundation. And to the extent they
22 don't have a solid financial foundation, that calls into
23 question whether or not they'd be able to pay, capable of
24 paying any damages to the extent we went that far, we got that
25 far in this particular case.

Bero - cross by Yao

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1 And if you can establish damages but you can't
2 collect damages as a plaintiff, then you're certainly going to
3 be irreparably harmed.

4 MR. LOMUSCIO: Nothing further, your Honor.

5 THE COURT: All right. Cross-examination.

6 MR. YAO: Yes, your Honor.

7 CROSS-EXAMINATION

8 BY MR. YAO:

9 Q. Good afternoon, Mr. Bero.

10 A. Good afternoon.

11 Q. Okay. So first question, so you indicated in your report
12 that there needs to be a causal nexus in addition to
13 irreparable harm for an injunction, correct?

14 A. I'm not sure I followed that.

15 Q. Okay. Let's start with in your report, you wrote that
16 there appears to be some causal nexus between the '723
17 and '256 patents and the demand for the patented products,
18 correct?

19 A. Yeah, yeah. It's causal nexus.

20 Q. Causal.

21 A. Correct, rather than causal. Yes.

22 Q. And you just testified earlier that direct competition
23 between competitors suggests causal connection as well,
24 correct?

25 A. That's an indicator as I understand it, which makes sense.

1 That's one of the indicators, yes.

2 Q. Okay. In your -- in your expert report on page 21, I
3 would say paragraph 85, you give examples of what the Federal
4 Circuit indicates for a causal nexus.

5 So, first, let's take a look at you quoted: Evidence
6 that a patented feature is one of several features that cause
7 consumers to make their purchasing decisions; second, evidence
8 that inclusion of a patented feature makes a product
9 significantly more desirable; and, third, evidence that the
10 absence of a patented feature would make a product
11 significantly less desirable.

12 Do you remember writing those?

13 A. Yes.

14 Q. So, however, in your report, have you included any
15 evidence of any patented feature that causes consumer to make
16 their purchasing decisions?

17 A. Are you referring to the first bullet point, cause
18 consumers to make their purchasing decisions?

19 Q. Yes.

20 A. I have not analyzed that, no.

21 Q. Have you included evidence that the inclusion of a
22 patented feature makes a product significantly more desirable?

23 A. I've referenced somewhere in my report, and I haven't
24 analyzed that issue specifically with regard to all the
25 features and competition, but I would note that somewhere in

1 my report, I address one of the -- one of the declarations
2 that plaintiffs presented were that the designs were
3 revolutionary, which certainly -- now, I haven't gone out to,
4 set out to establish that or prove that, but certainly to the
5 extent that's the case, then that would certainly fit that
6 bullet point there.

7 Q. But the information you provided in this report of
8 patentable feature that you just described, those were
9 provided by plaintiffs, correct?

10 A. I'm sorry, I'm not sure I followed that.

11 Q. So in your report, you just described that you might have
12 talked about evidence of the inclusion of a patented feature
13 that makes a product significantly more desirable, you just
14 indicated that your report might have referenced that.

15 Are those information based on what plaintiffs have
16 given you?

17 A. That information I referenced? Yeah, that comes from, I
18 believe, a declaration. I can't remember the name of the
19 individual. I think it's spelled C-I-U is the last name, but,
20 yes, that -- and as I said, I didn't set out to establish that
21 particular bullet point, if you will.

22 Q. Well, have you done your own independent analysis?

23 A. That's what's contained in my -- my declaration, yes. As
24 I said, I -- I analyzed, I was asked to analyze the issue of
25 direct competition and commercial success as it relates to

1 this issue, this nexus issue.

2 Q. So --

3 A. That's what I was asked, that's what I analyzed.

4 Q. So is it your opinion that direct competition between
5 different businesses would essentially mean that there is some
6 causal nexus that would be established, that all we need is
7 direct competition?

8 A. No, that's -- that's not my opinion. As I said, as I say
9 in my report, if you look at paragraph 86, I understand it
10 considers these issues and I understand the nexus considers
11 the issue of whether there is direct competition and whether
12 the patented products have had commercial success. I have
13 been asked to address these two issues.

14 Q. So let's take a look at direct competition.

15 In your report, in that section, you wrote -- you
16 indicate that plaintiffs are one of the biggest competitors in
17 the hoverboard market, which is a competitive market. That's
18 on paragraph 88. And on paragraph 90, you also indicated that
19 Unicorn considered Gyroor defendants to be direct competitors
20 in the U.S. hoverboard market, correct?

21 A. Correct.

22 Q. Are there -- are there any data to support that, that
23 would support the notion that Unicorn considers Gyroor
24 defendants to be direct competitors in the U.S. market?

25 A. Is there data?

1 Q. Yes. Is there data?

2 A. Yeah. I mean, this whole case is about -- this whole case
3 is about the defendants offering these accused products for
4 sale through Amazon and through various online websites, which
5 are hoverboards, and that's not -- that's not complicated.
6 That's pretty obvious.

7 And we know the plaintiffs also sell these similar
8 types of hoverboards. So I think it's very obvious that
9 they're direct competitors.

10 Q. Are you aware that there are also other direct competitors
11 in this hoverboard market?

12 A. Absolutely.

13 Q. So how would that affect your -- your opinion or analysis,
14 knowing that there are other competitors, direct competitors,
15 out there in the market?

16 A. It doesn't -- it doesn't matter. I mean, the fact is
17 these two companies sell similar looking hoverboards and
18 they're direct competitors. There may be other competitors as
19 well, but when we're looking at the issue of direct
20 competition, I mean, it's pretty obvious, I think.

21 Q. Well, are you aware that there are other substitute
22 products in the market as well?

23 A. I'm aware there's other hoverboard products, certainly. I
24 haven't made any attempt at this point to analyze all the
25 different hoverboards that are available and, you know, the

1 different features and so forth and so on.

2 I do note in here some of the market data which
3 indicates some of the bigger competitors in the market.

4 Q. So in your -- you also indicated, let's go to the
5 commercial success portion. You indicated that on
6 paragraph -- on paragraph 98, you indicated that from
7 September 2020 through approximately August 2021 -- sorry --
8 2021, I understand Unicorn's monthly sales of patented
9 hoverboards were approximately 50 percent less than they were
10 in comparable months in 2019 and 2020.

11 Do you have any data of most recent sales or, I'm
12 sorry, do you have any most recent data?

13 A. I don't have any other -- any subsequent data from
14 plaintiffs, and as I noted before, I don't have any of the
15 defendants' data. It hasn't been provided.

16 Q. So you didn't include any most recent data in this -- in
17 this third supplemental report for plaintiffs' motion for a
18 preliminary injunction, correct?

19 A. Right. That took us up to I believe it was the -- there
20 was a hearing in August of 2021, but I don't have any updated
21 data since then.

22 Q. So you don't have any data of commercial success of this
23 year, 2022, correct?

24 A. I don't have any sales data in 2022, that's correct.

25 Q. So you only include sales data of 2019 in this report,

1 correct?

2 A. No. I have sales data from 2019 up through September of
3 2020, and just those periods, as I indicated, are over 50
4 million in sales.

5 And my understanding is that after that period of
6 time, the monthly sales dropped, and it had to do with the
7 function of a couple of different factors. One was there was
8 a big sales bump due to COVID in 2020 that diminished sales,
9 and subsequent to September of 2020, it was experienced not
10 only by the plaintiffs but by other large manufacturers of
11 hoverboards.

12 There were some -- part of that was issues associated
13 with supply chain, trying to get parts, as we all know that
14 that was a challenge.

15 And then plaintiffs also believe, I can't speak to
16 this, but they believe that the defendants' sales were cutting
17 into their own sales.

18 Q. So you're basically basing off of what plaintiffs have
19 told you at least for they have less -- approximately less
20 than 50 percent of the sales of 2020 and 2021 without any
21 actual data that you received from plaintiffs, correct?

22 A. No, I -- no, your question didn't make sense. It's not
23 consistent with what I've just said. Their sales based on
24 information that maybe help -- based on information the
25 plaintiffs told me or provided to me, I believe it was again

1 in a declaration, is that after September of 2020 for the next
2 year approximately, their sales were about half of what they
3 were during the previous 12-month period.

4 Q. And in your report, you haven't established any exclusive
5 market share for plaintiffs, correct?

6 A. I don't know what you mean by exclusive market share. I
7 talk about the issue of market share in the hoverboard market
8 broadly in my report, but I'm not -- I don't know what you
9 mean by exclusive market share.

10 Q. Well, let me interface it. Do you think the plaintiffs
11 own the majority of the market share in the hoverboard market?

12 A. No.

13 Q. Even with the sales --

14 A. Just to be clear, just to be clear, when I'm answering
15 these questions, I'm focusing only on the U.S. market.

16 Q. Yes. I'm also only focusing on the U.S. market as well.

17 But even after you've seen all the data and sales
18 report of -- provided to you by plaintiffs, that's your
19 opinion, that the plaintiffs did not hold a good amount or a
20 substantial amount of market share in the hoverboard market?

21 A. That's not correct. As I talk about in my report, I
22 looked at -- there was, I believe, a market share study that I
23 refer to which indicated that Hangzhou Chic had I believe it
24 was 5 or 6 percent of the hoverboard market.

25 But it also indicated that the entire hoverboard

1 market, and I believe that was in 2019, was a little over a
2 million units, and we know from the data that Hangzhou Chic
3 had sold I believe it was 230 million, it's in my report,
4 but -- or my declaration, I should say -- but based on the
5 unit data that I had, that would indicate that Hangzhou Chic
6 actually had approximately 19 or 20 percent of the market.

7 So certainly that's a significant part of the market,
8 but, again, we don't -- we don't have all the data certainly
9 at this point on market share.

10 Q. But based on the data you've seen that was provided by
11 plaintiffs and you also cited I believe it's other competitors
12 such as Segway and other competitors in the market and as well
13 as defendants' data, is it your opinion that plaintiff has,
14 not a majority, but has a good amount of market share in the
15 U.S. hoverboard market?

16 A. It would appear that they have a nice chunk of the market.
17 It's not entirely clear to me at this point anyway what
18 exactly that market share percentage is.

19 Q. In your report, have you discussed any indication of price
20 erosion?

21 A. I note it's one of the forms of damages that are
22 potentially available in patent cases, but I'm not -- not
23 suggesting that there is. I haven't done that kind of an
24 analysis.

25 My understanding is the plaintiffs believe defendants

1 may have been undercutting their prices, but I have not -- I
2 don't have an opinion on that. I have not studied that.

3 Q. So you have no opinion as to whether there are price
4 erosion in this case, correct?

5 A. That's correct.

6 Q. All right. Let's go back to the market share topic.

7 Based on the data that plaintiffs provide to you,
8 they said -- they indicated that they lost approximately
9 50 percent of sales in 2020 and 2021. Would that have any
10 effect as to their market share?

11 A. So what you stated at the beginning of that question was
12 not correct. I didn't say they lost 50 percent of their sales
13 in '20 and '21.

14 They said that from September of 2020 through August
15 of 2021, their sales had dropped about 50 percent. So for
16 that one-year period, their sales were lower by 50 percent.

17 Q. Well --

18 A. And then the next part of your question was related to
19 market share, does that indicate their market share was lower.
20 And as I said before, I don't know all the market share data,
21 but the plaintiffs believe, from discussing with other
22 hoverboard manufacturers or gathering information in the
23 market, is that the entire market dropped in late 2020 and
24 through at least August of 2021, relative to the preceding
25 12-month period, and there's two primary reasons.

1 One is the period leading up to that timeframe, there
2 was -- there was a run on, if you will, a lot of people were
3 buying hoverboards. As we know, you know, COVID caused lots
4 of people to, you know, spend more time outside and whatever.
5 So that inflated their sales during that period over and above
6 what they had projected and expected.

7 But then on the flip side that you're now measuring
8 against -- in the subsequent time period, you're now measuring
9 against the higher bar that they didn't expect in the first
10 place. So the belief was that those sales in 2020 had --
11 basically were sales they otherwise would have made later.
12 And so that's why their later sales were lower. In part, that
13 along with the supply chain issues that I mentioned, and as I
14 also indicated, they thought that defendants had taken some of
15 their sales.

16 But, you know, again, I can't -- I can't establish
17 that. I can't prove that. I haven't done that type of an
18 analysis yet.

19 Q. So as you indicated in your resumé that you're a CPA.
20 Based on -- and you have seen sales data provided by
21 plaintiffs in the previous years, and based on your projection
22 and your expertise as a CPA, would you consider that the loss
23 of -- if there is any loss of market share, that's due to many
24 different reasons, such as the COVID-19 pandemic, supply chain
25 issues, and that the defendants alleged infringing activity

1 has no bearing or effect on the market share?

2 A. I'm not really sure I followed that question because it
3 didn't make an awful lot of sense. So you can either try
4 again, or I can try to answer what I understand you maybe were
5 trying to ask.

6 Q. I'll rephrase that.

7 So since plaintiffs said that they believed that, you
8 know, they lost or they might have lost approximately
9 50 percent sales between 2020 and 2021, and that could be
10 contributed to a lot of factors, such as COVID-19 pandemic,
11 supply chain issues and other factors that's just out of
12 control, and based on your expertise as a Certified Public
13 Accountant, and you've seen sales data provided to you by
14 plaintiffs of their previous years' sales data given -- but
15 you haven't seen as of right now, correct? You haven't seen
16 any data as of 2021 or 2022?

17 A. Correct. That's correct. I haven't seen that data.

18 Q. So is it your -- based on just your expert opinion as a
19 Certified Public Accountant that the approximate loss of sales
20 is due to many contributing factors, which defendants' alleged
21 infringing activities in this case might not even have any
22 effect on the approximate loss of sales?

23 A. Just -- I need to be clear. I'm not -- the plaintiffs
24 aren't claiming -- I'm not claiming, I'm not suggesting that
25 these are lost sales, that 50 percent isn't intended to

1 indicate they lost those sales.

2 So I'm not -- I'm not claiming those are lost sales,
3 and I hope that's really clear in my declaration. I haven't
4 quantified that kind of a damages-type analysis.

5 But there are factors that I just -- we've just been
6 talking about that are reasons those sales were lower for that
7 late 2020 and nine months or eight months in 2021 period
8 compared to the preceding 12 months.

9 And, yeah, there are a variety of factors certainly
10 that would play into that.

11 Q. So it is possible that defendants' alleged infringing
12 activities in this case have no effect whatsoever on the
13 approximate lower sales of the plaintiffs' products?

14 A. You keep talking about the lower sales. A damage case
15 typically, and certainly in a patent case, it's not about
16 lower sales. That might indicate, be an indicator, but it's
17 about lost sales due to the infringement, and I haven't
18 quantified what those lost sales are.

19 I have an example in here suggesting that if you
20 simply used a market share approach to the damages, which we
21 oftentimes do in patent cases, at least 5 or 6 percent or
22 whatever their market share would be reasonably attributable
23 of those sales would be reasonably attributable to the
24 plaintiffs.

25 But that's not intended to be a damages analysis or a

1 claim that they've lost sales or certainly a quantification of
2 lost sales because, quite frankly, as I've said, I don't have
3 the information. I don't know what the defendants have sold
4 because that information hasn't been -- hasn't been produced.

5 Q. Well, let's go to the point where you indicated in your
6 declaration, I believe it's on --

7 THE COURT: How much more do you have on cross?

8 MR. YAO: I would say, like, ten minutes max.

9 THE COURT: All right.

10 BY MR. YAO:

11 Q. Let's take a look at page 28 of your declaration,
12 paragraph -- paragraph 118 to 120.

13 You indicated that Gyroor defendants claimed that
14 more than 1 million of the U.S. account have been frozen as a
15 result of the preliminary injunction and that they claim that
16 the defendants would go out of business if an injunction was
17 not dissolved, meaning that you believed that the Gyroor US
18 defendants would be insolvent, correct?

19 A. I didn't necessarily believe they would be insolvent.

20 Q. That they don't have the ability to pay damages, correct,
21 meaning that --

22 A. That's certainly an indicator that -- that there's a
23 question there that if they're suggesting they're going to
24 have to go out of business if they don't get an injunction,
25 that tells me a couple things.

1 It tells me they're heavily reliant or entirely
2 reliant on these products that we're talking about, and if
3 that's the case, then they have limited resources to be able
4 to pay damages in the event that plaintiffs are able to -- or
5 would be able to subsequently prove damages.

6 It's a limited amount of information, but that -- I'm
7 not saying they're being insolvent, but I'm saying that the
8 limited information is they're dependent on these products,
9 and without them, there's nothing else to the -- to the
10 business or limited or else maybe they have other products
11 they're losing money on. That could be true. It could be as
12 well. I just don't know.

13 Q. Well, as you are aware, as you are aware that you were
14 here since the morning during the opening statements for both
15 parties, you heard that Gyroor US and the other Gyroor
16 defendants are still currently in this case, meaning they are
17 not insolvent or go bankrupt.

18 Would that -- since the fact that they are not
19 insolvent or go bankrupt, does that change your position
20 that -- that they might -- they might not be able to pay any
21 damages?

22 A. Not necessarily. It could indicate that they have some
23 sort of funding and access to cash that -- but we don't know
24 if they've just been shut down or if they haven't been -- we
25 don't know if they're owned by -- I don't know if they're all

1 owned by the same company or entity or entities.

2 But, you know, if you have a company that's a
3 defendant and they're going to go out of business in a short
4 period of time if they can't sell the allegedly infringing
5 products, that doesn't bode well for a plaintiff being able to
6 collect on damages.

7 They may have some other -- they may have -- I mean,
8 there's a lot of different explanations for how they're paying
9 for this -- you know, these ongoing legal issues, but that
10 doesn't necessarily mean it's the company that's paying.

11 Q. But that does indicate that compensatory damages are --
12 are available in this case instead of a drastic remedy of
13 preliminary injunction, correct?

14 A. Well, I'm looking at it from an irreparable harm issue.
15 I'm not looking at the whole, you know, all these issues. I
16 know there are a lot of issues to resolve, but, you know, if
17 you have -- if you have an entity that is -- owns all of these
18 entities, I don't know, but if you do, you have an entity
19 that -- or a partial owner in some of these entities that's
20 willing to fund litigation costs until the case gets resolved,
21 they don't necessarily have to -- they don't necessarily --
22 they're not in a position necessarily where they have to pay
23 if the -- if there are damages awarded against the defendant.

24 I mean, it's a legal corporate structure kind of
25 issue. And as I said in my deposition, I brought this point

1 up a couple of years ago in one of my declarations, and I
2 haven't seen any indication that they do have the ability to
3 pay. And maybe they do, but given the limited data I have, it
4 calls it into question.

5 Q. So just a few more questions.

6 So let me ask you about third party respondent
7 Gaodeshang-US.

8 Do you know Gaodeshang-US is or, I'm sorry, was a
9 defendant in this case?

10 A. Which entity?

11 Q. It's called -- I'll spell it for you --
12 G-A-O-D-E-S-H-A-N-G-US.

13 A. Is that one of the ones that we -- I don't remember. I
14 can't remember the name of the entities.

15 Q. So if this entity has not sold any of the alleged accused
16 products in this case, does that change your analysis?

17 A. If it hasn't sold any accused products?

18 Q. Yes.

19 A. I don't know that it changes my analysis, but I don't know
20 why they'd be -- I mean, there wouldn't be any damages --
21 well, I suppose there could be potential for damages, but
22 probably not significant damages, generally speaking.

23 So if they're out of the case or if they're not
24 selling products and they likely didn't cause any damages,
25 it's not a given, but it would tend to certainly suggest that

1 that's more likely than not, then defendants wouldn't be
2 irreparably harmed by them continuing to sell something that
3 they don't sell in the first place.

4 MR. YAO: That will be it, your Honor. Nothing
5 further.

6 THE COURT: All right. Any redirect examination?

7 MR. LOMUSCIO: No, your Honor.

8 THE COURT: All right, sir, you're excused. Thank
9 you.

10 All right. Does the plaintiff have any additional
11 witnesses or evidence to present by way of this hearing?

12 MR. LOMUSCIO: No, we do not, your Honor.

13 THE COURT: All right. Well, I've read all the
14 briefs, many briefs filed, both before and after the Federal
15 Circuit decisions, and we've heard testimony now from several
16 witnesses today.

17 The defendants have another expert they wish to call
18 next week, but that may be unnecessary.

19 A plaintiff seeking a preliminary injunction must
20 establish that he is likely to succeed on the merits, that
21 he's likely to suffer irreparable harm in the absence of
22 preliminary relief, and that the balance of equities tips in
23 his favor, that an injunction is in the public interest.

24 And in reviewing the grant or denial of a preliminary
25 injunction, the Fed Circuit looks, at least on the likelihood

1 of success analysis, they look at the Federal Circuit law.

2 To show a likelihood of success on the merits, a
3 patentee must show that it will likely prove infringement of
4 the asserted claims. If the defendant raises a substantial
5 question concerning infringement, the preliminary injunction
6 should not issue. A substantial issue of infringement is
7 raised if the defense or if the defense -- let me rephrase
8 that.

9 If the defendant raises a substantial question
10 concerning infringement, the preliminary injunction should not
11 issue. Here the patentee has not shown that the infringement
12 defense raised by defendants lacks substantial merit. So for
13 that reason, because there has been I don't believe on a
14 preponderance standard a finding that there is likelihood of
15 success on the merits by the plaintiff, I'm going to deny the
16 preliminary injunction.

17 I'm going to issue a written opinion to supplement
18 this quick oral ruling, but there's no point having you come
19 into town next week. There's no point having the defendants
20 bring in another expert witness. I'm satisfied, having heard
21 the testimony, having seen the actual alleged infringing
22 products, having read the declarations of the experts and
23 heard from -- having heard from three of them, I'm satisfied
24 that an injunction should not issue in this case for the
25 reasons given.

1 I'm going to ask the parties to email to my courtroom
2 deputy all the PowerPoints used today, and on the issue of the
3 proper parties being in the case, I'm going to -- is your
4 motion to clarify, does that sufficiently set forth your
5 position as to the proper parties, or do you wish to
6 supplement it?

7 MR. YAO: Your Honor, I will have to go back and
8 doublecheck, and we will email the courtroom deputy about the
9 status, and we can go from there.

10 THE COURT: If you're going to rest on your motion to
11 modify, let her know, and then I'd ask the defendants to
12 respond to it, and I'd give you 14 days to respond.

13 From the time you learn, if that's what they're going
14 to rest on, or if you wish to supplement it, you should do so
15 promptly. Talk to defense counsel and see -- or plaintiffs'
16 counsel and see what the timeframe can be, but we should
17 resolve that issue before we take the next steps in the case,
18 which I assume is summary judgment briefing.

19 I have no opinion. My review here is limited to
20 likelihood of success on the merits, and that doesn't prejudice
21 any summary judgment either party could file and certainly
22 doesn't prejudice what a jury may decide if there are fact
23 issues that prevent summary judgment from being granted to
24 whoever seeks it.

25 Any questions by plaintiff?

1 MR. LOMUSCIO: No, your Honor.

2 THE COURT: Any questions by defendant?

3 MR. YAO: No, your Honor.

4 THE COURT: All right. I'd like the hoverboards that
5 are up on the bench taken back. We have a hoverboard in
6 chambers. I believe it was provided by defendants, but does
7 anyone remember who gave us a hoverboard?

8 MR. CHENG: Us.

9 THE COURT: Defendants? You can retrieve it. If not
10 today, have your local counsel come over and get it in the
11 next week or so --

12 MR. CHENG: Okay.

13 THE COURT: -- from chambers. You don't have to lug
14 it out today if you don't want to, but it's there if you want
15 it.

16 Okay. We won't need the actual products. We've
17 reviewed them. We don't need those for purposes of issuing a
18 written opinion, which will follow relatively soon.

19 All right. Once we clarify the issue of parties,
20 then I will ask you for a joint status report. Once we rule
21 on that clarification, perhaps there's no need to clarify once
22 you've briefed it if there's agreement, but once that has
23 taken place, I need to know what the next steps are:
24 Settlement conference or summary judgment briefing.

25 If it is summary judgment briefing, I need to know --

1 hopefully you can come up with an agreed briefing schedule
2 whether it's one side seeking it, another side not, or whether
3 it's joint summary judgment motions. Either way, come up with
4 an agreed briefing schedule.

5 If you can't reach an agreement, note your
6 disagreements in an email to my courtroom deputy, and I'll
7 resolve the disagreements and we'll have a briefing schedule
8 on summary judgment, and then we'll proceed from here.

9 Okay. Last chance, any questions by plaintiff?

10 MR. LOMUSCIO: No, your Honor.

11 THE COURT: Any questions by defendant?

12 MR. YAO: No, your Honor.

13 THE COURT: All right. Thank you all for a very
14 interesting presentation and for the witnesses and their time.
15 Thank you all.

16 (Which were all the proceedings heard.)

17 C E R T I F I C A T E
18 We certify that the foregoing is a correct
19 transcript from the record of proceedings in the
20 above-entitled matter.

21 */s/ Kelly M. Fitzgerald*
22 _____

23 */s/ Kathleen M. Fennell*
24 _____

December 3, 2022

25 Official Court Reporters
United States District Court
Northern District of Illinois
Eastern Division

Date